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72-1086

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DELONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY, *Petitioners,*

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon and the Court of Appeals of the State of Oregon, Department 2.

OPINIONS BELOW

The Supreme Court of the State of Oregon without opinion on November 8, 1972 (App. p. 1a) denied a petition to review the judgment and opinion of the

Court of Appeals of the State of Oregon, Department 2, reported in 94 Oregon Advance Sheets 983, 495 P. 2d 1215 (1972), affirming the unreported opinion (in the form of a letter to counsel dated January 31, 1969) of the Circuit Court, Marion County, Oregon (App. p. 3a). The Supreme Court without hearing or opinion, on December 12, 1972 denied (App. p. 2a) a petition for reconsideration of the petition for review and a supplemental petition for reconsideration.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon denying the petition to review the judgment of the Court of Appeals was entered on November 8, 1972 (App. p. 1a). The judgment of the Supreme Court of the State of Oregon denying the petition and supplemental petition for reconsideration of the denial of the petition for review was entered on December 12, 1972 (App. p. 2a). The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the failure of both the Trial Judge and the Respondent, adverse party below, to disclose to Petitioners, prior to trial and judgment, the substantial and concurrent business relationship between the Judge and Respondent, (consisting of the purchase of a large tract of real estate from plaintiff-Respondent by a partnership of three partners including the Trial Judge), and the subsequent trial and determination of the controversy by such Trial Judge deprived Petitioners, defendants below, of due process of law in violation of the Fourteenth Amendment.

2. Whether the Trial Judge denied Petitioners due process of law by a specific ruling discrediting all of the evidence of Petitioners in a lengthy trial because Petitioners did not call to the witness stand one certain witness whose deposition was taken for trial purposes by stipulation of the parties, and admitted by the Trial Judge as evidence during the trial.

3. Whether the Trial Judge denied Petitioners due process of law by entering a declaratory judgment finding Petitioners liable for any damage due to delay incurred by a third party, severed from this case at pretrial, who instituted a separate action in another Oregon Circuit Court against Petitioners which was pending at the time this case was tried and decided and still is pending.

4. Whether Petitioners were denied due process of law by Respondent's introduction at the trial, and the Trial Court's material reliance upon, exhibits fraudulently offered and substantially altered.

STATUTES INVOLVED

The Statutes of Oregon in respect of disqualification of a judge (ORS 14.250 ff.) are found in the Appendix, p. 50a.

STATEMENT OF THE CASE

The facts in this due process case are simple, uncontested and shocking:

They involve principally the failure of a Trial Judge to disclose to Petitioners, one party to a highly publicized breach of contract suit involving millions of dollars, a private, long-standing and profitable business

relationship with the other party (Respondent State of Oregon), existing during the pendency (including the pre-trial proceedings) of this litigation on the contract between the parties for construction of foundations for the Astoria Bridge over the Columbia River. This relationship, had it been disclosed, would have given the aggrieved party an absolute right under Oregon state law to recuse the Judge. The case involves further the failure of the Supreme Court of Oregon to grant relief or even a hearing under its discretionary review jurisdiction or supervisory powers, when these facts, accidentally discovered by Petitioner while the case was under review in the State Supreme Court, were timely brought before it.

One important point must be made at the outset: This petition is not the result of baseless, harassing or vexatious litigation in court after court by a disappointed litigant (as in *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.,* 441 F. 2d 631 (1971), certiorari denied, 404 U.S. 941.[1] In the instant case a factual and substantial business relationship between the Trial Judge and the adverse party was discovered and brought to the attention of the Supreme Court of Oregon in October, 1972. The only factual comment made by Respondent was not a denial of any of the substantive allegations of an undisclosed business relationship between Respondent and the Trial Judge, but a protest that no showing has been made that the

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[1] As shown below, *Kinnear-Weed* dealt solely with the Federal Disqualification Statute, 28 U.S.C. 455. The Oregon Disqualification Statute differs substantially from the Federal State, in that it does not commit disqualification to the discretion of the trial judge, provided that the affidavit demanding such disqualification is based on reasonable grounds. ORS 14.260 (App. p. 50a).

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substantial and recent transaction complained of "will ultimately be profitable".[2]

It is also important to keep in mind that the affidavits of prejudice filed, *nunc pro tunc* upon discovery of the business relationship involved, were signed (as is this Petition) by a member of the Oregon Bar of years' standing who at one time was the Chairman of the Judicial Fitness Commission and by a member of a large firm of many years' standing in the Oregon Bar. The concern in this case is one that reaches beyond that of unsuccessful litigant-Petitioners. It is the concern of the public and of the Bar for the integrity of the judicial system.

Chronologically and summarily stated, the facts are as follows:

In August, 1964, Petitioners' action against Respondent on their contract in the U.S. District Court for Oregon was dismissed as forbidden by the Eleventh Amendment. *DeLong Corporation* v. *Oregon State Highway Commission,* 233 F. Supp. 7, affirmed 343 F. 2d 911, cert. denied 382 U.S. 877.

On December 15, 1964, Respondent's Board of Control, consisting of the Governor (who appointed Judge Jones), the Secretary of State and the State Treasurer,

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[2] "Defendants [Petitioners here] blatantly assume that this was a favorable transaction for Judge Jones and his associates. There is no evidence that the land has been resold or that their extensive agricultural enterprise will ultimate be profitable. The only possible basis for plaintiffs' claim is their reference to the reappraisal of the Colony Farm along with other property in connection with the loan from the Prudential Insurance Company".—Defendant's Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. (US DC, Dist. of Oregon, C.A. 73-20).

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approved a request "originating with Judge Jones" to purchase Colony Farm and to rent it at $30.00 an acre pending title clearance (Minute Book of Board of Control, App. p. 14a).

Respondent, on August 30, 1965, by and through its Highway Commission, filed its complaint against Petitioner in the Circuit Court of the State of Oregon for the County of Marion. The Circuit Court at that time was composed of four Judges. The presiding Judge (because of his administrative commitments in that capacity and because of his close social relationship with Special and Chief Trial Counsel for the State) declined presiding at any trial of the case. Another associate Judge was assigned primarily, if not exclusively, to domestic relations cases. A third Judge was disqualified by Respondent for the remote reason that his attorney brother was an office associate of counsel for a secondary party whose case had been severed in pretrial proceedings. Thus the only remaining Judge, the actual Trial Judge, Judge George A. Jones, at all times was the most likely, if not the only Judge, to be assigned to the trial below. This Judge assumed full control of the case in the pretrial deposition stage.

On February 1, 1966, Respondent's Board of Control accepted Judge Jones' offer to purchase Colony Farm for $175,000.00, $25,000.00 down and a 20-year payout at 5½% interest (Contract of Sale, App. p. 21a). The sale price was based on a July, 1965 appraisal made by Don J. Mason of Salem, who also made appraisals for the State of Oregon Highway Commission (App. p. 30). The 1965 appraisal and 1966 sale price average out to approximately $421.00 per acre (App. p. 17a). During the pendency of this case in the

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Marion County Court (though prior to its formal assignment), the partnership in which Judge Jones owned a one-third interest was therefore indebted to Respondent in an amount of approximately $150,000.00.

On July 5, 1967, shortly before the case was set for trial, the Trial Judge and his partners borrowed $700,000.00 from Prudential Insurance Company secured by a mortgage on the State property and adjoining property purchased by the partnership from third parties. This loan was used to prepay the entire twenty-year debt then owed to Respondent. The average valuation of all the property mortgaged in the refinancing was $650.00 per acre, an increase in average value in one year of more than 50%. (App. p. 17a).[3]

In view of the prior federal and pending state litigation the controversy between Petitioner and Respondent was not a minor case resting unnoticed in the files of the Clerk of the Circuit Court of Marion County. The controversy involved was well publicized in the newspapers of Oregon. It involved the construction of foundations for a gigantic interstate highway bridge over the Columbia River, just a two-hour drive from the Marion County Courthouse. Not only the legal community, but also the business community of the State, as well as the general public, were well aware of the names of the parties, the millions of dollars involved, and the adamant position taken by Respondent State of Oregon in the controversy. The whole matter

[3] No allegation is intended or should be implied either that a preference was shown to the Trial Judge by the State officials or that he received a windfall, or that the loan on the property was obtained when it was, and the indebtedness to the State paid, in order to complete the purchase from the State before a proceeding to try this case in which the State was a party.

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received considerable newspaper attention, not only in all the press of Oregon, but also the press of Seattle and other Washington papers, and even in the New York Times. Furthermore, the also highly publicized collapse of the John Day Bridge and the problems with other bridges designed by the State of Oregon Highway Commission, all in the same period of time, were connected in publicity with this case. DeLong Corporation asserted (and still asserts) that the State was responsible not only for the delay but also for millions of dollars' damages suffered by DeLong. The controversy, therefore, was so bitter, vocal and much discussed that it must be presumed that the Trial Judge knew of it long prior to the actual filing of this action.

The trial below before Judge Jones without a jury extended over a six-month period and included 493 exhibits and 9038 pages of testimony. It resulted in a short letter opinion to counsel containing several completely unfounded and indefensible holdings whose magnitude amount to an unconstitutional denial of due process, rather than being simply legal error of an unbiased Trial Judge. Among them is the holding of the Trial Court (App. p. 7a):

> "It is evident from the foregoing that any delay from the date of cancellation caused to the United States Steel Corporation, the successful bidder for the superstructure, is the fault of the Defendant and the Court so declares".

United States Steel Corporation had originally been a party to the action below but had been dismissed at pretrial. This company then re-filed two separate cases against Petitioner and Respondent herein in a different Circuit Court in the State of Oregon. Neither

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case has been tried and no proof as to the responsibility for damages due to delay, if any, incurred by United States Steel (let alone the extent of such damages) has been adduced anywhere. Nor has any evidence been adduced or trial been had on any defense that either Respondent or Petitioner might have against United States Steel. The declaration by the Trial Court constituting a "resolution" of all these complicated issues is based on no process of law; it certainly was not arrived at by due process.

Another and the most bizarre denial of due process to be brought to the attention of this Court is the Trial Court's discrediting of all of Petitioner's evidence, in patent mis-application of an Oregon statute relating primarily to jury instructions, but apparently misunderstood and relied upon by the Trial Judge as the sole trier of the facts.

The Trial Court ruled (App. p. 5a):

> ". . . Defendant had potential witnesses under his control, for instance Colonel DeLong, that did not appear during the trial. This in the face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with caution".

Prior to trial, it had been stipulated that Witness DeLong, because of his required presence in Vietnam, would testify by deposition. His absence at trial was anticipated by all parties and a deposition for trial purposes of 222 pages was taken. The Court, during trial, ruled on the objections made during the deposition and admitted the testimony in evidence without

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hesitation or comment, and certainly without warning that Petitioners were endangering months of oral and documentary testimony. It was months after the trial and in the letter opinion that the Trial Court announced that it viewed not only Witness DeLong's testimony, but all of Petitioner's evidence "with caution",[4] because his body was not timely produced in the Courtroom. Because of his failure to elucidate further, Petitioners have a right to and must assume that their entire case was fruitless and tainted because one witness testified via perpetuated testimony instead of in person.

Still another matter of constitutional magnitude involves extrinsic fraud. This Court is not requested to review on direct appeal or by this petition any bona fide errors committed by the Trial Judge. Therefore, no detailed statement of the issues below is required. However, certain unlawful holdings by the Trial Judge and certain instances of fraud practiced upon the Trial Court are of such magnitude that they amount to a denial of procedural due process. They are therefore included as subsidiary questions for review and must be recounted in this statement, not only in support of the questions presented, but also to round out the picture of actual harm done to Petitioners, over and above

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[4] Despite the "for instance" reference to Colonel DeLong, no specific finding was made as to any other "potential witnesses" under Defendants' control who did not appear, nor does the Record show any such witnesses. Every witness under control of Petitioners called by the State of Oregon was produced. There were a great number of State witnesses who did not appear, particularly the ones that actually authored the questioned exhibits, but no reference to the failure of the State to produce not only potential but absolutely necessary witnesses under its control at the trial can be found in the Opinion.

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the violation of its constitutional right to trial before a fair and unbiased Judge.

Despite the length of the trial, the wealth of testimony and documentary evidence produced, the Trial Court in its brief letter opinion decided the case in favor of Respondent on the narrow issue of whether defective concrete seals in a single pier, Pier 169, of the substructure of the bridge had been the fault of Petitioner or the fault of the State. The Trial Court (affirmed by the Court of Appeals) held for Respondent, the State of Oregon, and relied on a finding that Petitioner had negligently placed the concrete in the Columbia River. (App. pp. 5a-6a).

The key evidence relied upon by the Trial Court in finding for Respondent was Plaintiff's Exhibits 113 and 488 and the testimony supporting their introduction. The entry in Exhibit 113 was relied on to prove negligent work in placing the concrete. Witness Ellison, the Field Engineer for the State, testified that it was an original diary; had been kept under his supervision and that he did not know of "anything that has been deleted from them or added to them or edited in any way" (R. 321-322). The key point in the diary, upon which Respondent State's expert witnesses and the Trial Judge relied, related to an alleged defective pipe through which the concrete was poured. (App., pp. 6a, 55a). This was, by judicial admission, the only evidence in the Record supporting this finding (R. 8547-8549). Contrary to the testimony to the effect that nothing was added to the diaries, this key item was indeed later added at page 19 of Exhibit 113. How much later we do not know, but we now realize that different writing instruments were used, the writing

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was not continuous, and changes were made even to the alterations.

Petitioner destroyed the impact of the questionable Exhibit 113 by obtaining and introducing, late in the trial,[5] the State's own laboratory reports of samples of the concrete actually poured, Defendant's Exhibit A-15, which sets forth the actual formula employed in mixing the concrete for Pier 169. This formula was concededly the State's sole responsibility (R. 8589; 8596). The State's own expert testified that this State-prescribed and State-analyzed formula would not produce proper concrete (R. 8439-8444). It was Oregon, therefore, that was responsible for the defective seals at Pier 169.

The pendulum had swung full course; the State had lost its case. The State instead of attacking the laboratory reports, produced another "document", again identified by Witness Ellison as a contemporaneously prepared set of diary-type documents, Exhibit 488. This exhibit consisted of tabulation sheets of the number of bags of materials shipped to the pier site for making or mixing the concrete there. Allegedly, the State inspectors had placed a concrete formula on these sheets for their ready reference.

The probative value of this new evidence again rested entirely on Witness Ellison's testimony that the concrete formula was inserted in the sheets at the exact time of the tabulations and by the State inspectors signing the documents. It has been discovered that these entries were made by unidentified persons at times different from those making the tabulations.

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[5] The State had successfully resisted discovery of these reports until the trial was almost over. (R. 7373; 8583).

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Thus, in a full and fair trial, Petitioner would have prevailed, for no one can make good concrete out of the wrong materials and the Record is now conclusive that Respondent's technical errors caused the bad concrete.[6]

The special business relationship between Judge Jones and Respondent and the use of altered exhibits were discovered accidentally while the case was under review and during a factual investigation relating to the merits of the case (App. p. 13a). As soon as a responsible presentation could be made, it was made to the Supreme Court of Oregon in the Supplemental Petition for Review. With this Supplemental Petition for Review, Chief Counsel for Petitioner DeLong and Chief Counsel for Travelers, the surety below, filed statutory affidavits of prejudice in an attempt to recuse the Judge *nunc pro tunc* (App. p. 8a). As shown below, the filing of these affidavits prior to trial would have forced Judge Jones to disqualify himself without any showing of actual prejudice being needed.

The only ruling, if any, Judge Jones could have made under Oregon law upon the filing of such affidavits would have been on the issue whether the fear of prejudice asserted in the affidavits was a reasonable one. By his failure to disclose the relationship, he deprived Petitioner of an opportunity to submit this issue to him or any appellate Court. The Supreme Court of

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[6] One of the many oddities of this case was the fact that more than a month after the alleged diary entry in Exhibit 113 relied on by the Trial Court to find a breach of contract by Petitioner, Witness Ellison gave a newspaper interview in which he stated that he did not know what had "gone wrong". Seattle Post Intelligence, February 16, 1964, p. B1.

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Oregon, which had discretionary jurisdiction (and supervisory power) to remand the case to Judge Jones or to another Circuit Court Judge, on this only remaining issue, i.e., whether the affidavits were based on a reasonable fear of prejudice, declined to exercise this jurisdiction or power. This petition follows.[7]

REASONS FOR GRANTING THE WRIT

I. The Failure of the Oregon Supreme Court To Grant a New Trial in View of the Trial Court's Undisclosed Business Relationship With Respondent Deprived Petitioners of Due Process of Law.

The Supreme Court of Oregon below, in denying the Petitioners' supplemental petition to reconsider denial of the petition to review the decisions of the lower state courts because of the newly discovered substantial business relationship between the Trial Judge and the Respondent, decided a federal question of substance in a manner contrary to recent and controlling decisions of this Court. *Commonwealth Coatings Corp* v. *Continental Gas. Co.*, 393 U.S. 145; cf. *Ward* v *Monroeville*, decided November 14, 1972, 93 S.Ct. 80 *Tumey* v. *Ohio*, 273 U.S. 510.

In *Commonwealth, supra,* this Court stated (p. 148)

> "We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of

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[7] On January 10, 1972 Petitioners filed in the U.S. District Court for the District of Oregon, their original complaint in equity to enjoin collection of the judgment, together with their motion for a temporary restraining order and a preliminary injunction. As of the filing of this petition, these motions are under advisement. The District Court has requested additional briefing on the applicability of the Eleventh Amendment to the Constitution and the anti-injunction statute, 28 U.S.C. § 2283 as barring the exercise of the District Court's equity powers.

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> justice had, unknown to the litigant, any such relationship [an arbitrator's business relationship with a party to the proceedings, less substantial than Trial Judge's relationship with the Plaintiff-Respondent here] the judgment would be subject to challenge".

The instant case presents a much more compelling situation for review than *Commonwealth, supra.,* both because of the more substantial business relationship involved and also because of the principle that a Judge in a court of justice, here a Trial Judge of the facts as well as the law, is held to a higher standard of impartiality and of freedom from entangling business relationships with litigants than an arbitrator drawn from the business community of the litigants.

1. In *Commonwealth* the disqualified arbitrator was a consulting engineer whose firm had received $12,000.00 for professional services rendered to one party over a period of five years, the last transaction having occurred more than a year prior to the arbitration. But even though both lower Courts had determined that the arbitrator acted without any prejudice, and the complaining party did not claim actual prejudice, this Court determined that failure to disclose the relationship required reversal and setting aside of the award.

Here we find undisputed documentary evidence in Respondent's official state records that after this action was commenced on August 30, 1965 the Respondent on February 1, 1966, acting through its State Board of Control, composed of Respondent's Governor, Secretary of State and Treasurer, accepted an offer from Green Villa Farms, a partnership of three equal partners including the Trial Judge, to purchase a tract

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of land known as Colony Farm for $175,000.00 on a valuation by a State appraiser, a part time consultant for the State Highway Commission which was directly involved in this case.[8] The contract of sale (App. p. 21a), executed on February 22, 1966 by Respondent's Governor Mark O. Hatfield, Secretary of State Tom McCall and State Treasurer Robert W. Straub and on February 23rd by the three partners including the Trial Judge, George A. Jones, provided favorable terms of $25,000.00 down payment with the balance payable in equal payments in 20 years at 5½% interest. The buyers could immediately take possession of the property and a Bargain and Sale Deed to the property was to be delivered when the balance of the purchase price was paid. Thus, the Trial Judge and his partners were indebted to Respondent in the amount of $150,000.00 while this well publicized case, brought by Respondent, was pending in his Court. On July 5, 1967, shortly before this case was formally assigned to and accepted by the Trial Judge,[9] he and his partners obtained a loan of $700,000.00 from Prudential Insurance Company secured by a mortgage (App. p. 18a) on this tract and adjoining land owned by the partnership. From these proceeds the partners paid Respondent the balance of $150,000.00. Then a Bargain and Sale Deed dated June 23, 1967 and recorded on July 5,

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[8] The relationship of the Trial Judge with the Respondent was unearthed accidentally in investigating other aspects of the case (App. p. 13a).

[9] Respondent obtained disqualification of one of the three available Judges by asserting relationship between the Judge and attorney for one of the subordinate parties in the construction project. The second Judge refused to take the case because of administrative duties so that Respondent in effect chose the Judge before whom the case was tried.

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1967 to the individuals comprising the partnership, including the Trial Judge, was executed by Respondent's then Governor Tom McCall, Secretary of State Clay Hyers and State Treasurer Robert W. Straub (App. p. 20a).[10]

Thus we find that the Trial Judge accepted assignment of this case, involving complex factual and legal issues for trial without a jury, without either the Trial Judge or the Respondent disclosing the very substantial contemporaneous real estate transaction between them so favorable to the Trial Judge through his partnership. No other evidence than the recorded documents is required.

2. On principle a Trial Judge exercising general and unlimited jurisdiction should be held to a standard of judicial ethics at least as high as the arbitrator in *Commonwealth, supra.* In that case the Court quoted, as comparable to the rule of the American Arbitration Association requiring a disclosure of relationship with a party, Canon 33 of the Canons of Judicial Ethics as follows (p. 149):

> "33. Social Relations.
>
> ". . . [A judge] should, however in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business

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[10] Another mortgage (App. p. 28a) in favor of Prudential Insurance Company was recorded on May 17, 1971 to secure an additional loan of $345,000.00 to the Trial Judge's partnership for total loans of $1,045,000 on the land purchased from the Respondent for $175,000.00 and adjoining land owned by the partnership.

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> relations or friendships constitute an element in influencing his judicial conduct."[11]

Even the concurring and dissenting opinions in *Commonwealth,* recognizing the degree of independence of arbitration awards from judicial review, also recognize the need for a stricter standard for judges. Mr. Justice White in the concurring opinion joined by Mr. Justice Marshall states (p. 150):

> "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."

Mr. Justice Fortas, with whom Mr. Justice Harlan and Mr. Justice Stewart joined, in his dissenting opinion states (p. 155):

> "The Court applies to this process rules applicable to judges and not to a system characterized by dealing on faith and reputation for reliability."[12]

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[11] The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association on August 16, 1972 provides in Canon 5 "A Judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties" and then goes on to provide in subdivison "C Financial Activities—(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transaction with lawyers, or persons likely to come before the Court on which he serves."

[12] The decisions following and preceding *Commonwealth* recognize that arbitrators, often chosen for their knowledge of the business community in which the dispute arises, are likely to have a business relationship with a party which is not disqualifying even

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3. If the undisclosed relationship here were with a private party, failure to reveal it surely would taint the judgment and require a new trial. The fact that the party here is a sovereign state cannot excuse non-disclosure. Indeed compliance with Canon 33 of Canons of Judicial Ethics quoted above, and Canon 26 requiring a judge to "refrain from relations which normally tend to arouse suspicion that such relations warp or bias his judgment" (adopted by the Oregon Bar Association in 1952), appears to require that judges avoid relationships particularly with a party such as a sovereign state, the most frequent party before the state courts in civil as well as in criminal matters.

Possible prejudice and bias is at least as great where the judge's business relation is with a public body. A judge might very well be less entangled with a private party from whom he purchased real estate in an arms length transaction at market price in the competition of the market than from a public body, as here, on the basis of one appraisal and on most favorable terms of payment which permitted promptly mortgaging the property for substantially more than the purchase price.

4. Oregon is one of the states which provides by statute that the filing of an affidavit of prejudice in good

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if substantial providing it is disclosed. *Cook Industries* v. *Iliah*, 449 F.2d 109 (C.A. 2); *South Eastern Coal* v. *Consolidated Coal*, 434 F.2d 792 (C.A. 6); *Garfield Co.* v. *Weiss*, 432 F.2d 852 (C.A. 2); *Rogers* v. *Schering Corp.*, 165 F.Supp. 295 aff. on District Court's opinion 271 F.2d 266 (C.A. 3); *Baar & Beards, Inc.* v. *Oleg Cassini, Inc.*, 37 A.D. 2d 106, 322 N.Y. Supp. 2d 462; *Cross Properties Inc.* v. *Gimbel Bros.*, 15 A.D. 2d 913, 225 N.Y. Supp. 2d 1014, aff. 12 N.Y. 2d 806, 236 N.Y. Supp. 2d 61; *Milliken Woolens, Inc.* v. *Weber Knit Sportswear Inc.*, 11 A.D. 2d 166, 202, 43, aff. 9 N.Y. 2d 868, 216 N.Y. Supp. 2d 696.

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faith "is sufficient on its face to recuse a judge." *State ex rel. Lovell* v. *Weiss,* 250 Or. 252, 430 P.2d 357, 359 (1967); cf. *Disqualification of Judges for Prejudice or Bias,* 48 Or. L.R. 311-410 (1969). It is clear that Petitioners were deprived of their absolute right under Oregon law to recuse the Trial Judge for his business relationship with the Respondent. The instant law suit by the State of Oregon against Petitioners, a Delaware construction company and a Connecticut insurance company as surety, involves grave contentions that state officials withheld from Petitioners important engineering data on the difficult conditions to be met on the project. In these circumstances it is most unlikely that the Trial Judge, without a jury, would have been acceptable to Petitioners despite his business relationship with the Respondent. As a minimum, Petitioners, by disclosure of the relationship, should have been granted the opportunity to consider the problem and decide whether to request the Judge to recuse himself (App. pp. 8a-11a).

The Oregon Legislature has not spoken expressly on disqualification for "substantial interest" or for being "connected with any party", as has the Congress in 28 U.S.C. § 455. ORS. 14.120 requires mandatory disqualification (in addition to other reasons irrelevant here) if the Judge is party to, or directly interested in the action, suit or proceeding (ORS. 14.210(1)(a)) or if he is related to any party or attorney for any party or an office associate of any such attorney by consanguinity or affinity within the third degree (ORS. 14.210 (1)(c)). It may well be that the failure of the Legislature to provide expressly for mandatory disqualification or at least for disqualification within the discretion of the Trial Judge in the case of a substantial

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business relationship, or as the Federal Statutes express it, of being "so related to or connected with any party or his attorney", would render the statute unconstitutional if construed as not requiring a fair trial before a fair and disinterested judge.

Assuming without conceding that the issue of being connected with, or having a relationship with, a party to a suit was intended to be covered by the disqualification for prejudice statute (ORS. 14.250), the failure of that statute to require notice and disclosure raises such failure to constitutional magnitude. In any event, Oregon's failure to enact clear statutory pronouncements on disqualification of a trial judge connected to one of the parties by a substantial business relationship underscores the need for a definitive and authoritative pronouncement by this Court on this procedural due process issue.

II. An Authoritative Pronouncement by This Court on the Propriety of Business Relationship Between a Judge and a Party Before Him Is Urgently Needed.

This Court should review this question in this case because the bench and bar sorely need the guidance and direction of this Court on this question. It is true that in recent years Committees of Congress have considered additional legislative standards for non-judicial conduct of judges, including business activities;[13] the Judicial Conference of the United States has adopted

[13] Hearings before Subcommittee on Separation of Powers of Committee on Judiciary of United States Senate on Non-judicial Activities of Supreme Court Justices and Other Federal Judges, 91st Cong. 1st Sess.; Final Report by Special Subcommittee of House Judiciary Committee on H. Res. 920 on Associate Justice William O. Douglas, 91st Cong. 2nd Sess.

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and modified rules for Federal Judges in this area;[14] the American Bar Association has adopted the new Code of Judicial Conduct;[15] and there has been much discussion of the problem.[16]

Apart from *Commonwealth, supra,* however, there is little judicial authority on disqualification of a judge because of a substantial business relationship with a party involved in a case before his Court. The case involving a judge's financial interest in the case before him, *Tumey* v. *Ohio, supra,* or relationship of a judge with a party or counsel of a party, *Carr* v. *Fife,* 156 U.S. 494; *Texaco Inc.* v. *Chandler,* 354 F.2d 655, cert. denied 383 U.S. 936, do not supply an easily applicable standard of conduct for cases of a separate business relationship between a judge and a party. The extra-judicial discussions of the subject are diffuse and inconsistent.

Efforts to deal with this serious constitutional problem by hortatory bar association standards, not readily enforced against judges, or even by judicial administrative rules as helpful guidelines are of limited effect.

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[14] Judge Robert A. Ainsworth, *Judicial Ethics—The Federal Judiciary Seeks Modern Standards of Conduct,* 45 Notre Dame Lawyer 470(1970).

[15] Canon 5 of the Code of Judicial Conduct adopted August 16, 1972.

[16] See generally Dean Acheson, *Removing the Shadow Cast on the Courts,* 55 ABAJ 919 (1969); Hastings, *Judicial Ethics as it Relates to Participation in Money Making Activities,* Univ. of Chicago Law School Conference on Judicial Ethics (1964); Judge Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics,* 35 Law & Contemporary Problems 3 (1970); McKay, *The Judiciary and Non-Judicial Activities,* 35 L&CP 9; Frank, *Disqualification of Judges; In Support of the Bayh Bill,* 35 L&CP 43.

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The binding effect of an authoritative decision by this Court, based on a strong factual situation such as presented here, would be of inestimable value. No direct guidance has been given in the decisions of this Court. Since it is a question of constitutional due process, a decision by this Court is most appropriate.

A statement of applicable rules by this Court on this case would immediately become available to all federal and state judges and to the bar generally and would serve effectively both as a guide to correct conduct and an inhibition of relationships threatening that independence of the judiciary which in the last analysis must rest upon popular acceptance of its impartiality. That impartiality and independence will best be supported by an authoritative decision of this Court enforcing impartiality.[17]

For all of the reasons stated it is urged that this question be reviewed in this case involving a clear factual situation.

III. Petitioners Were Denied Due Process of Law by the Trial Court's Declaration in Its Opinion That Petitioners Are Responsible for All Delays of U.S. Steel Corporation, Builder of the Superstructure of the Bridge.

The complaint, and the first and second amended complaints, joined U. S. Steel Corporation as a party defendant and alleged that U. S. Steel was asserting that Petitioners were responsible under their contract for damage caused to U. S. Steel by delay in the completion of the foundations on which Petitioner DeLong

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[17] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) is another example of a situation in which pending federal and state legislation to deal with an urgent problem, providing counsel for indigent defendants, made no headway until this Court defined the constitutional principle involved. Legislation immediately followed. Criminal Justice Act of 1964 as amended, 18 U.S.C. 3006A.

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had worked. The complaint further prayed that the Court should declare that any such delay and damage was the fault of Petitioner DeLong. The Circuit Court, however, sustained DeLong's demurrer and dismissed U. S. Steel Corporation as a defendant on the ground that the issues involving U. S. Steel Corporation were separate and different issues not properly included in this lawsuit. The third amended complaint eliminated U. S. Steel as a defendant. It alleged only that U. S. Steel Corporation was asserting a claim for damages due to delay against Plaintiff-Respondent and requested a declaration that any such delay or damages were the fault of Defendant-Petitioner DeLong.

On August 30, 1967, U. S. Steel commenced an action against defendants here in the Circuit Court for Multnomah County, Oregon, asserting defendants' liability for any delay caused by them to U. S. Steel's construction of the superstructure. It simultaneously filed a separate suit against Respondent State.

Although U. S. Steel as a defendant and issues involving it were eliminated from this case and are asserted in separate actions commenced in 1967, untried and still pending, the Trial Court nevertheless in its opinion in this action dated January 31, 1969, states (App. 7a):

> "It is evident from the foregoing that any delay from the date of cancellation caused to the United States Steel Corporation, the successful bidder for the superstructure, is the fault of the Defendant and the Court so declares".

Thus, the Trial Court in this case declared rights and liabilities of defendant-Petitioners on an issue previously eliminated from this case, not tried in this case,

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and awaiting trial in a separate case. Such a declaration by the Trial Court denies defendant-Petitioners their day in court and deprives them of due process of law.[18]

For this reason alone the judgment below denies defendant-Petitioners a fair trial, should be reversed, and a new trial ordered.

IV. The Trial Court's Ruling Discrediting Defendants' Testimony in Whole or in Part, Deprives Petitioners of Due Process of Law.

Both appellate courts below ignored Defendant-Petitioners' contention that the Trial Court erred grievously, and denied Defendants due process of law, by including in its letter opinion, and as an introduction to its findings in favor of Plaintiff and against Defendants, a ruling that Defendants' evidence should be viewed with caution; in other words, that Defendants' testimony was untrustworthy. The ultimate impact of this ruling, inasmuch as the opinion in no way retreats from its extreme meaning that the Trial Court wholly discredited Defendant's evidence, is wholly to destroy Defendants' case. In the face of the Trial Court's factual reference in its opinion, the Defendant-Petitioners are convinced that the Trial Court wholly ignored what, absent this ruling, would have been Defendants' conclusive evidence.

The Trial Court stated (App. p. 5a):

> "... Defendant had potential witnesses under their control, for instance Colonel DeLong, that did not appear during the trial. This in face of

[18] It is to be noted that U.S. Steel is now asserting in its separate action that the Trial Court's declaration in this case constitutes collateral estoppel against Petitioners in that separate action.

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> the general rule that if weaker and less satisfactory evidence is offered when it appears that more satisfactory evidence was in the power of the party to produce, the evidence should be viewed with caution".

The Trial Court did not specify any other "potential witnesses" except the witness named; nor does the Record give any indication of any such witness. Instead, the Record clearly shows that every witness called by Plaintiff-Respondent who was under Defendants' control, did appear. In fact, the witness named by the Trial Court, Colonel DeLong, was a witness at the trial. Because of his contemplated absence in Vietnam, during the trial, in connection with the war, a trial deposition was taken in pretrial proceedings by stipulation of the parties. His testimony consisted both of direct and of cross-examination. At the point in the trial when Defendants determined that this witness' testimony would be useful in rebuttal, and the witness could not be present, his deposition was offered in evidence. After ruling on all of the objections made during the deposition by the parties, the Trial Court admitted the deposition in evidence.

The action of the Trial Court in admitting this deposition was wholly in accordance with the pretrial stipulation of the parties, as the Court so found, and in accordance with Oregon Statutes, Sec. 44.010, which defines a witness as, "a person whose declaration is received as evidence to any purpose, whether made on oral examination, by deposition, or by affidavit" (App. p. 52a).

It is fair to add in this brief recital that it may be fairly inferred that the entire decision of the Trial

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Court rested on this one ambiguous and improper ruling, discrediting Defendants' evidence, a ruling obviously in complete conflict with the trial ruling admitting the evidence of Witness DeLong. One example will suffice. In its opinion the Court finds that scour, i.e., erosion, in the Columbia River in September and October, 1963, was the responsibility of the Defendant contractor (App. p. 5a). There is no evidence in the Record to support this finding. On the contrary, there is Plaintiff's contemporaneous written "Order for Extra Work", dated October 17, 1963 (Exhibit H in evidence, App. inserted after p. 55a), which states expressly that, "no erosion work included in the contract", i.e., a written admission by Plaintiff that that erosion or scour was not the responsibility of the contractor, DeLong Corporation. Despite this documentary evidence and admission, the Trial Court erroneously found DeLong responsible for the erosion.

Oregon statutes provide for a jury instruction by the court, "on all proper occasions" that less satisfactory evidence should be viewed with distrust if more satisfactory evidence is within the power of the party (§ 17.250, App. p. 53a) and that there is a disputable presumption that higher evidence would be adverse from inferior evidence being produced (§ 41.260, App. p. 51a). But the Supreme Court of Oregon has authoritatively ruled that to give such an instruction or to apply such a presumption in an inappropriate factual situation is reversible error. *State* v. *Thomson*, 203 Or. 1, 278 P. 2d 142 (1954); *Godvig* v. *Lopez*, 195 Or. 301, 202 P. 2d 935 (1949) *Fitze* v. *American-Hawaiian S. S. Co.*, 167 Or. 439, 117 P. 2d 825.

The Supreme Court of Oregon applies these statutory provisions in the same manner as courts generally

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apply the ...lge-made rule that in appropriate cases the inferei ...'s applicable, but a misapplication is reversible error. *Wynn* v. *U.S.*, 397 F. 2d 621 (CA DC 1967); *Jenkins* v. *Bieschek*, 333 F.2d 421 (CA 8); *Boyer* v. *The Merry Queen*, 202 F.2d 575 (CA 3 (1953)); *Bean* v. *Riddle* (Mo. Sup. Ct.) 423 SW 2d 709 (1968); *Critzer* v. *Shegogue*, 236 A.2d 411, 204 A.2d 180 (1964); *Ala.* v. *Larisey*, 269 Ala. 203, 112 So. 2d 203 (1954); McCormick, *Evidence*, § 272 (2nd Ed. 1972); Wigmore, *Evidence*, §§ 285-292 (3rd Ed. 1940).

Critzer and *Bean, supra*, are particularly apposite here, because they point out that where, as here, the witness has given a deposition, his evidence is available to either party and it is reversible error to draw the unfavorable inference against the evidence produced by one party who does not call the witness. *A fortiori*, in this case, in which the deposition of Colonel DeLong was placed in evidence on stipulation of the parties, there was no possible basis whatever for the Trial Court to distrust, or view with caution, Defendants' evidence because Defendants did not call Colonel DeLong as a witness in person to repeat on the witness stand what he stated in the deposition introduced in evidence.[19]

It is submitted that this denigration of all of Defendants' evidence by the trier of the facts was not

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[19] It is noted that not only did the parties stipulate that the deposition testimony of Witness DeLong could be offered at trial, but it was specifically agreed by Counsel at the outset of the deposition as follows: ". . . You should ask all questions that you would ask at the regular trial of this case, and likewise that the opposite party should ask questions at cross-examination such as he would ask at the time of trial, so that the deposition will be so far as we can make it a complete reproduction of the testimony of this witness" (Exh. T 15 pp. 8-9).

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only plainly reversible error but was so grievous as to constitute denial of due process of law, requiring reversal and a new trial. The error is so gross that consciously or unconsciously, it must, or at least may have been, triggered by prejudice, establishing (though by hindsight) that an affidavit of prejudice because of the substantial business relationship with the thus favored party—had it been disclosed—would indeed have been based on reasonable apprehension.

V. Plaintiff's Use of Fraudulent Exhibits Deprived Defendants of Due Process of Law.

The sole basis for claims by Plaintiff-Respondent Oregon, is the alleged responsibility of Petitioner for the defective seal of concrete poured at Pier 169, one of the twin major piers emplaced in the river bed to support the Astoria Bridge over the Columbia River. The contract between the parties provided (1) that the concrete should be poured under the immediate supervision of the Oregon State Highway Commission Engineer; (2) that the concrete deposited in water should be Class A with 10% excess cement and that still water should be maintained at the point of deposit with watertight cofferdams; and (3) that the proportions by weight of cement, aggregates (sand and gravel), water and air entraining agent necessary to conform to these requirements, should be determined by the Commission's laboratory tests and the Commission's Engineer should have complete control of proportioning the concrete materials.

The concrete on Pier 169 proved defective in that the concrete did segregate and bulk and did not provide proper seals. The Plaintiff contended the Defendant was at fault and breached its contract by failing to

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replace the defective seals. Defendant countered this claim with proof that the Plaintiff had prescribed the wrong concrete mixture, and that this factor, together with the impossibility of maintaining still water at the site due to erosion of the river bottom, was responsible for the defective seals. Both of these factors were the responsibility of the State and not of DeLong. Defendant added proof that Plaintiff's engineers had contemplated this erosion but had neither designed for it nor notified Defendant.

The Trial Court rejected the Defendants' contention and purportedly accepted the testimony of the Plaintiff's experts that the cause of the poor concrete was the slow rate of pour, failure to use more than one tremie pipe during the pour, and failure to maintain a tremie pipe in such condition as to exclude such excess water during the pour (App. p. 5a).

The Trial Court's conclusion, insofar as it was based on evidence, could only have been based on Exhibit 113 (App. p. 55a) in accepting Plaintiff's view, and on Exhibit 488 (App. inserted after p. 55a) in rejecting Defendant's proof. These exhibits were both offered as contemporaneous records kept in the ordinary course of business, but in fact, containing entries not made in the regular course of business or at the time of the original entries, but subsequently, *after* the defective seal on Pier 169 was poured and Plaintiff was considering termination of the contract. This material added to these exhibits *post litem motam,* is the only evidence which could support the conclusion that the defective seal on Pier 169 was Defendant's responsibility and not Plaintiff's responsibility.

(a) *Concrete Mix and Exhibit 488*—Defendant introduced into evidence the Highway Commission's lab-

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oratory reports (Exh. A-15, App. inserted after p. 55a) on the composition of the concrete, made pursuant to the contract, which disclosed that the concrete mix being prepared and used under control of Plaintiff, was by ratio of weight, cement 94 lbs. to sand 177.5 lbs. to gravel 378.3 lbs., which produced concrete which the Commission's own expert, Gerwick, testified contained too much gravel for satisfactory concrete. But the expert witnesses all agreed that the Highway Commission should have ordered a mix of the approximate ratio of 1 to 1.8 to 2.7; whereas, the mix actually used as shown by the laboratory reports showed a ratio of 1:1.8:4.

The Plaintiff attempted to refute this unimpeachable evidence concerning the faulty concrete mix, which was Plaintiff's responsibility, by introducing at the end of the trial (although not produced during pretrial discovery) the "Columbia River Bridge Concrete Pour Record Sheets" (Exh. 488, App. inserted after p. 55a), which recorded the number of bags of concrete, each containing 1½ yards of material, filled and delivered to barges for transport to the river site four miles away, during each shift. These sheets, signed by the Government inspector of the number of bags filled and delivered for transport, did not originally contain a recitation of the concrete mix but on each sheet there was added, in different handwriting, figures indicating a mix of ingredients to make acceptable cement. This false evidence was the only basis in the Record for rejecting Defendants' contention that the concrete seal on Pier 169 failed because of a defective mixture of materials. Again it is pointed out that the responsibility for this mix was solely Plaintiff's.

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(b) *Scour and Exhibit 113*—Furthermore, the situation was aggravated by the inability to obtain still water into which to pour the concrete. The concrete seal was to have been poured below the river bottom which was itself 48 feet below the surface, in still water and within a steel cofferdam emplaced by Defendant. But because of erosion and scour of the river bottom by the swiftly flowing current, the bottom fell away to almost twice the depth of 48 feet below the surface, a condition contemplated by Plaintiff but unreported and ignored in design. Before the concrete pour of the seals began, Oregon, in an effort to control the excessive erosion, dumped a hill of rock around the cofferdam walls. The physical result, unknown at the time, was that plates constituting the cofferdam were wedged apart as much as one-half inch, and river water entered the space so that the pour was being made in moving water rather than in still water as required by the contract, and this contributed to the defective seals.

Plaintiff sought to shift its responsibility for the defective seals to the Defendants and to escape responsibility by contending that the Defendant's pipe through which the concrete was poured, was inadequate and defective. For this contention, Plaintiff sought to rely chiefly on an entry in a "Resident Engineer's Diary for the period December 11 to December 21st, 1963" (Exhibit 113, App. p. 55a) covering part of the period of the concrete pour from December 4 through December 17, 1963.[20] After the regular entry for De-

[20] Exhibit 113 is one of a series of 36 exhibits, similar diaries introduced into evidence together at the beginning of the trial, but without reference to the entry relied upon subsequently in this factual dispute.

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cember 15th on page 19 of the diary, appears an additional entry dated January 10, 1964, three weeks later after termination of Defendant's attempt to pour the concrete seal and after Plaintiff had decided to blame Defendant for its failure. The entry purports to recount that between December 12 and December 15th, the engineer signing this tardy entry, "noticed water gushing between the flange joints of the tremie pipe". This after-thought entry is by judicial admission (R. 8547-9) the only basis in the Record for the Court's conclusion that the cause of the poor concrete was Defendant's fault.

The Defendant-Petitioners submit that the receipt of these altered exhibits in evidence as contemporary records made in the ordinary course of business, although including items apparently subsequently entered to support Plaintiff-Respondent's position in this litigation, was a deception and fraud on the Court which deprived Defendant-Petitioners of a fair trial and due process of law. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944).

CONCLUSION

Petitioners have been refused any hearing below on the substantial federal question that their Fourteenth amendment due process rights have been violated by being adjudged liable for millions of dollars to Respondent by a trial judge with a recently discovered, undisclosed, substantial, contemporaneous and profitable business relationship with Respondent. The indisputable facts appear on title documents of record consisting of a contract of sale and deed of realty between the trial judge and Respondent and a mortgage recorded on the real property. An authoritative deci-

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sion of this Court is required both to protect Petitioners' constitutional rights and also in the public interest to provide guidance, not now available in this Court's decisions, for federal and state judges in respect of undisclosed business dealings with parties in litigation before the courts.

The other errors of the trial Court discussed herein emphasize the denial of due process of law suffered by Petitioners.

For the foregoing reasons it is prayed that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BERT B. RAND,
HANS A. NATHAN and
JAMES Q. SMITH,
1730 K Street, Suite 308,
Washington, D. C. 20006

GEORGE W. MEAD
Public Service Building
Portland, Oregon 97204

ARDEN E. SHENKER
801 Standard Plaza
Portland, Oregon 97204

Counsel for Petitioners

February 6, 1973

APPENDIX

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APPENDIX

STATE OF OREGON
SUPREME COURT
SALEM 97310

November 8, 1972

George W. Mead
Bert B. Rand
Norman E. Bayles
1211 Public Service Building
Portland, Oregon 97204

Arden E. Shenker
Farrand M. Livingston
801 Standard Plaza
Portland, Oregon 97204

Re: State of Oregon v. DeLong Corporation and Travelers Indemnity Company

Gentlemen:

I am directed to inform you that the court has today denied appellants' petition for review in the above matter.

Very truly yours,

/s/ MILDRED OLDENBURG
Mildred Oldenburg
Deputy Administrator

MO:bn

cc: Lee Johnson, Attorney General
John W. Osburn, Solicitor General
State Office Building
Salem 97310

Alan H. Johansen
1930 Georgia-Pacific Building
Portland, Oregon 97204

George A. Rhoten
300 Pioneer Trust Building
Salem, Oregon 97301

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STATE OF OREGON SUPREME COURT

LOREN D. HICKS
State Court Administrator

December 12, 1972

Mr. George W. Mead
Attorney at Law
1211 Public Service Building
Portland, Oregon 97204

Mr. Arden E. Shenker
Attorney at Law
801 Standard Plaza
1100 S.W. Sixth Avenue
Portland, Oregon 97204

In re: State v. Delong Corporation and The Travelers Indemnity Co.

Gentlemen:

The Supreme Court has today denied your petition for reconsideration of petition for review and supplemental petition for reconsideration.

Very truly yours,

/s/ J. DAVID GERNANT
J. David Gernant
Legal Counsel

JDG:mr

cc: Mr. Lee Johnson, Attorney General
Mr. John W. Osburn, Solicitor General
Mr. Alan H. Johansen, Attorney at Law
Mr. George A. Rhoten, Attorney at Law

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CIRCUIT COURT OF THE STATE OF OREGON
THIRD JUDICIAL DISTRICT - MARION COUNTY
SALEM, OREGON

IN CHAMBERS
GEORGE A. JONES, JUDGE

January 31, 1969

G. E. Rohde
Chief Counsel
Oregon State Highway Dept.
State of Oregon
Salem, Oregon

George A. Rhoten
Attorney at Law
310 Pioneer Trust Building
Salem, Oregon

Bert B. Rand
Attorney at Law
Suite 308, Riddell Bldg.
1730 K Street N.W.
Washington, D.C.

George W. Mead
Attorney at Law
1211 Public Service Building
Portland, Oregon

Lamar Tooze
Attorney at Law
801 Standard Plaza
Portland, Oregon

Re: State of Oregon v. DeLong Corporation and Travelers Indemnity Company, #59323

Gentlemen:

This matter came on for trial before the Court, without a jury, testimony was taken, exhibits offered and received,

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and the matter having been under advisement, the Court hereby makes the following findings:

Plaintiff and Defendant, DeLong, entered into a written contract for the construction of the substructure of a bridge crossing the Columbia River at Astoria, Oregon; Defendant Travelers Indemnity Company is the surety as required by said contract.

The Columbia River is one of the nations large rivers and the bridge was to be constructed across its estuary. The building of the substructure was subject to the problems of transversing several miles underwater, in a swift current, and complicated further by the ebb and flow of the tide. This project required vision and vigor on the part of all participants.

In April, 1964, Plaintiff terminated Defendant's contract basically for the failure of Defendant to remove and replace the bad concrete seal at Pier 169 and to prosecute with vigor the balance of the work at hand, the Court hereby finds that said cancellation was valid and proper.

The Plaintiff re-advertised and re-let the contract and the substructure work was subsequently completed by another contractor, to the Plaintiff's damage in the amount of $2,464,810.77, in the principal amount. This to draw interest from the respective dates expended by the Plaintiff, as per Exhibit "E" attached to the Fifth Amended Complaint.

Defendant contends that plans and specifications, particularly regarding sub surface information, were false and fraudlent and that they were wrongfully induced to enter into the contract because of said fraudlent misrepresentation. The Court rejects Defendant's claim in this regard, in that Defendant's employees had all the sub surface information that was available to the Plaintiff a considerable amount of time prior to beginning the work, further the Court finds that said sub surface information furnished on the plans was a reasonable representation of the difficulties expected to be encountered beneath the surface as construction progressed.

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Further, it appears to the Court that the extensive testimony and much ado made, regarding sub surface conditions was a make-weight argument by the Defendant in this case in order to divert attention from the real problem that led to the termination of the contract; that is, the final responsibility for the pouring of the bad concrete seals at Pier 169, particularly in light of the fact that all the piling necessary for the completion of this project had been driven with no more difficulty, than should have been anticipated while driving piling in the estuary of this great river.

The Court is aware of the death of Defendant's Superintendent Bauer but Defendant had potential witnesses under his control, for instance Colonel DeLong, that did not appear during the trial. This in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with caution.

Defendant makes much of the scour problem which occurred at Pier 169 and the subsequent events relating thereto, although the protection of the cofferdams at Pier 169, under the contract, was basically the responsibility of the Defendant. Plaintiff, for reasons of its own, undertook to abate this scour condition and did stabilize the bottom of the river by use of fascines and large quantities of rock. This necessitated the re-driving of a cofferdam and adjustment of the lower level of the concrete seals before pouring could commence. Defendant attempted to relate the scour condition of the ultimate failure of the concrete poured into the two cofferdams constructed at Pier 169, this concrete was to be the seals atop the piling driven at this site, which in turn formed the base for one of the main piers supporting the span across the main river channel.

The Court rejects the Defendant's theory and accepts the testimony of Plaintiff's experts, relating to the cause of the poor concrete at Pier 169, the basic causes being a slow rate of pour, the failure to use more than one tremie

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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission,

Plaintiff-Respondent,

v.

DELONG CORPORATION AND THE TRAVELERS INDEMNITY COMPANY

Defendants-Appellants.

Affidavit of George W. Mead

COUNTY OF
STATE OF OREGON } ss:

GEORGE W. MEAD, being duly sworn, deposes and says:

1. My name is George W. Mead and I am a member of the Bar of this Court engaged in the practice of law at 1211 Public Service Building, Portland, Oregon.

2. I am and have been chief counsel for Defendant (Petioner herein) DeLong Corporation in the instant controversy since prior to the filing of this case by the State of Oregon in the Circuit Court for Marion County.

3. I have analyzed the documentation relating to the business dealings between Plaintiff State of Oregon and the Trial Judge, the Honorable George A. Jones, as assembled by attorney-investigator John Cye Cheasty, and the statutes, case law and literature relating to the disqualification of judges.

4. In the light of the documentation aforesaid and the law as pertaining thereto, I have determined, after consultation with representatives of the client and with associate counsel, that if the facts reflected in all documentation aforesaid had been disclosed to me by the Trial Judge prior

to trial, I would have filed an affidavit of prejudice seeking disqualification of the Trial Judge herein.

5. Leave of this Court is respectfully requested to constitute the within affidavit an affidavit of prejudice within he purview of ORS.14.250, *et seq.*, incorporating therein by reference the facts recited in the affidavit of John Cye Cheasty dated the 21st day of November, 1972, and attached to the Supplemental Petition for Reconsideration of the Petition for Review.

6. It is prayed further that the Court permit this affidavit to be considered filed *nunc pro tunc*, as of the time of the assignment of this case to the Honorable George A. Jones for trial, in September of 1967.

7. This affidavit is made in good faith and not for the purpose of delay or any other purpose, but solely on the grounds that I believe that the Honorable George A. Jones has been at the time of trial herein, and would in the future be, prejudiced in favor of Plaintiff State of Oregon and against the interests of my cilent, DeLong Corporation.

8. I further pray that in the interest of justice this Court order that a new trial be had before a Trial Judge other than the Honorable George A. Jones.

FURTHER AFFIANT SAYETH NOT.

/s/ GEORGE W. MEAD
George W. Mead

SUBSCRIBED and sworn to before me this 30th day of November, 1972.

MARY MCHENRY
Notary Public for Oregon
My Commission Expires:
February 9, 1973

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission,

Plaintiff-Respondent,

v.

DELONG CORPORATION AND THE TRAVELERS INDEMNITY COMPANY,

Defendants-Appellants.

Affidavit of Arden E. Shenker

COUNTY OF
STATE OF OREGON } ss.

ARDEN E. SHENKER, being duly sworn, deposes and says:

1. My name is Arden E. Shenker and I am a member of the Bar of this Court engaged in the practice of law at 802 Standard Plaza, Portland, Oregon.

2. I am now chief counsel in the instant controversy for Defendant The Travelers Indemnity Company, having succeeded the late General Lamar Tooze in this capacity.

3. I have analyzed the documentation relating to the business dealings between the Plaintiff State of Oregon and the Trial Judge, the Honorable George A. Jones, as assembled by attorney-investigator John Cye Cheasty, and I have also researched and analyzed the statutes, case law and literature relating to disqualification of judges. While I am unable to state with certainty the position of the late General Lamar Tooze had the facts reflected in the affidavit of John Cye Cheasty been disclosed to him by the Trial Court prior to the trial herein, I can state without equivocation that I would have recommended to him that an affidavit of prejudice be filed seeking disqualification of the Trial Judge.

4. Leave of this Court is respectfully requested to constitute the within affidavit of prejudice within the purview of ORS. 14.250, *et seq.*, incorporating therein by reference the facts recited in the affidavit of John Cye Cheasty dated the 21st day of November, 1972 and attached to the Supplemental Petition for Reconsideration of the Petition for Review.

5. It is prayed further that the Court permit this affidavit to be considered filed *nunc pro tunc,* as of the time of the assignment of this case to the Honorable George A. Jones for trial, in September of 1967.

6. This affidavit is made in good faith and not for the purpose of delay or any other purpose, but solely on the grounds that I believe that the Honorable George A. Jones has been at the time of trial herein, and would in the future be, prejudiced in favor of Plaintiff State of Oregon and against the interests of my client, The Travelers Indemnity Company.

7. I further pray that in the interest of justice this Court order that a new trial be had before a Trial Judge other than the Honorable George A. Jones.

FURTHER AFFIANT SAYETH NOT.

/s/ ARDEN E. SHENKER

SUBSCRIBED and sworn to before me this 30th day of November, 1972.

Notary Public for Oregon
My Commission Expires:
July 23, 1976

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission,

Plaintiff-Respondent,

v.

DELONG CORPORATION AND THE TRAVELERS INDEMNITY COMPANY,

Defendants-Appellants.

Affidavit of John Cye Cheasty

CITY OF WASHINGTON
DISTRICT OF COLUMBIA } ss.

JOHN CYE CHEASTY, being duly sworn deposes and says:

1. My name is John Cye Cheasty and I reside at 1795 Popham Avenue, New York, New York. I am an attorney-investigator having previously been employed as a Special Agent by the United States Internal Revenue Service and thereafter having served in, and having retired from, the United States Navy with the rank of Commander. I have investigative experience for forty-two (42) years and have been a member of the Bar of the State of New York since 1933.

2. During the year of 1972, I was employed by the law firm of Trammell, Rand, Nathan & Bayles of 1730 K Street, N.W., Washington, D.C. to locate certain witnesses whose addresses were unknown and who last resided in the State of Oregon, to investigate the genuineness of certain documents and to do other factual research in connection with certain issues relating to concrete mix, involving a controversy then pending in the Oregon Courts between the State of Oregon Highway Commission and DeLong Corporation.

3. In the course of my investigation, I traveled to Oregon and spent several weeks interviewing persons in connection with this factual investigation relating to the De-

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Long controversy. During the month of May, I became aware of rumors to the effect that the trial judge in the DeLong-Oregon controversy had, at or about the time of the trial, received a loan of over one-half million dollars on some land in Oregon which formerly had been owned by the State.

4. This information was reported to Counsel employing me. I was instructed to make a discreet check of the records to see what they reflected and to report my findings. I did as instructed and found that as of 5 July 1967 Judge Jones was a one-third partner in Green Villa Farms. This partnership purchased land for $175,000.00 from the State of Oregon known as Colony Villa Farms or Colony Ranch, which land was adjacent to land owned by Green Villa Farms. On 5 July 1967, there was recorded a mortgage securing a loan of $700,000.00 granted to the partnership by Prudential Insurance Company of America. The mortgage covered all farm lands in which Judge Jones then had an interest. (Exhibit A-1 attached.)

On the same date, 5 July 1967, the State of Oregon granted a deed to Colony Farm to the partnership. This was to complete a Contract of Sale of said property which provded for a transfer of title when the terms of sale were complied with. This Contract of Sale was recorded as of 3 October 1966. (See Exhibits A-2 and A-3 attached.)

Another mortgage on this farm land had been recorded in favor of Prudential on or about 17 May 1971 in the sum of $345,000.00 to cover another loan to the partnership in like amount. (Exhibit A-4 attached.) The total Prudential mortgages amounted to $1,045,000.00 as of 17 May 1971.

Another mortgage of $54,000.00 in favor of Prudential recorded 11 August 1970 does not concern itself with the Colony Farm and is not included in the total of $1,045,000.00.

All of the above information was found by me in the records of Polk County, Dallas, Oregon.

5. I examined the minute book of the Board of Control of the State of Oregon and I found and copied the following two entries:

Dec. 15, 1964, p. 68

"Oregon State Correctional Institution
Colony Farm Further Considered.

A request originating with Judge Jones and Mr. Asa Lewelling to purchase the Colony Ranch was presented to the Board for its consideration. The group indicated that if immediate sale was not feasible, they would be willing to rent the land at $30.00 per acre, until such time as title could be cleared and the property advertised for sale. The Board indicated that they would prefer to clear title to the land prior to advertising the property for sale due to the higher expected return once the title question is resolved. The Board asked that a letter be sent to Judge Jones indicating the Board's decision and inviting his group to transmit a formal rental offer. If a higher offer is not secured, the secretary was authorized to rent the property at the $30.00 figure, if a firm offer is extended, the secretary was again instructed to advertise the property for sale as soon as the title had cleared."

The second entry is found on page 5 of the minutes of the meeting of the Board of Control for 1 February 1966:

"Oregon State Board of Control
Oregon State Correctional Institution.

Acceptance of Offer for Sale of Colony Farm.

The Board considered the offer made by the Green Villa Farms of Salem for the purchase of Colony Farm. Noting that the Green Villa Farms offer met

the minimum terms and price required by the Board of Control, a sale price of $175,000.00 on a contract sale with a down payment of $25,000.00 and the balance payable over a 20 year period at 5½ percent interest, the Board instructed the secretary to develop the necessary documents to complete the sale of this property. The offer from Green Villa Farms was the only acceptable bid received on this property."

6. I examined the records relating to the trade name of Green Villa Farm and found that there was filed, under date of 1 July 1964, in the County Clerk's Office for Polk County, Oregon, a notice of doing business under the assumed trade name of Green Villa Farms. The persons named in the filing were: Asa L. Lewelling, C. Parker Gies, George A. Jones, and David F. Kennedy, Jr.

On 1 February 1965, this was amended to show the following changes: Asa L. Lewelling, George A. Jones, and David F. Kennedy, Jr., Mr. Gies having died late in 1964.

7. Further inquiry with regard to the Colony Farm property showed that under date of 29 July 1965, an appraisal of this property was made for the State of Oregon by one Don J. Mason of Salem, Oregon. Mason is also a part-time consultant to the State of Oregon Highway Department. He appraised Colony Farm at a market value of $175,000.00 and another value of $177,250.00 if sold in separate parcels.

8. Sale to the partnership was authorized by the Board of Control on 1 February 1966, the date of the Contract of Sale for a sale price of $175,000.00, a down payment of $25,000.00 and annual installments of $12,500.00 until purchase price and interest are paid in full, with a final date of 31 December 1986. One condition of the Contract was that no deed would be granted until the full price had been paid.

9. This Contract of Sale, although dated 1 February 1966, was not recorded until 3 October 1966. What caused the delay has not yet been ascertained.

10. As of 1 July 1967, Green Villa Farms owed the State of Oregon approximately $149,000.00 in principal and interest.

11. The other parcels of land covered by the Prudential mortgage were acquired by the partnership as follows:

(a) On 10 April 1961, E. Clemens Horst Co. sold the partnership a farm. The sale price, as reflected by Federal Revenue stamps, was $256,000.00.

(b) On 31 December 1964, Leota J. Gies, the widow of original partner C. P. Gies, sold the partners certain land she had acquired, valued at $100,000.00 as reflected by the Federal Revenue stamps.

(c) In February of 1964, Ralph Williams had contracted to sell a certain parcel of land for $82,500.00, with a 10% down payment and installments of $6,500.00 per year. The deed withheld until the full purchase price was paid, which was done from the Prudential loan proceeds on 5 July 1967.

12. The State's deed to the Colony Farm property was recorded by the partners on 5 July 1967. The balance of $149,086.40 due on the purchase price plus interest, was received by the State out of the Prudential loan proceeds and credited to the State's general fund.

13. The appraisal which Don J. Mason had made in July of 1965 for the State of Oregon and on which the sale in 1966 was based, has been examined. Mason placed a gross value of $395.00 per acre on 416.3 acres and $485.00 per acre on the tillable 338 acres. This equals a fair market value for the whole land and buildings thereon of $175,-

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000.00. The sales price therefore was an average of $421.00 per acre. (See Exh. 5-A.)

14. Reliable information about the appraisal made in June or July of 1967 for Prudential Insurance Company of America tends to show that the total land was appraised at $1,200,000.00. A value of $650.00 per acre was given to all the described properties. The loan made by Prudential, as per mortgage records was $700,000.00 or 7/12 of the appraised value. The loan limit under Prudential's lending policy was 60% of appraised value at the time.

15. Despite the most diligent efforts (and partly because of the reluctance of some of the persons interviewed to provide me with the required information), I was unable to assemble the information contained in this affidavit until the end of October, or early November of 1972. Thus, for instance, when I tried to obtain the file relating to the purchase of the Colony Farm from the archives of the State of Oregon I was informed that said file was unavailable.

Due to the delays aforesaid, I could not assemble all the information and make my report aforesaid until approximately ten days prior to the date of this affidavit.

Further Affiant Sayeth Not.

/s/ John Cye Cheasty

Subscribed and sworn to before me this 21st day of November, 1972.

Louise G. Burroughs
Notary Public, D.C.
My Commission Expires:
September 30, 1976

Exhibit A-1 to Cheasty Affidavit

LOAN NO. PIC 2 159 355 BOOK 144 PAGE 116

ARIZONA-COLORADO-NEW MEXICO-OREGON-UTAH-WASHINGTON

Mortgage

THIS MORTGAGE, Made this 22nd day of June, A.D. nineteen hundred and sixty-seven, by and between ASA L. LEWELLING, GEORGE A. JONES and DAVID F. KENNEDY, JR., Partners d.b.a. GREEN VILLA FARMS and ASA L. LEWELLING and BETTY L. LEWELLING, husband and wife; GEORGE A. JONES (sometimes known as Jean M. Jones), husband and wife; and DAVID F. KENNEDY, JR. and MARGARET A. KENNEDY, husband and wife in the State of Oregon, hereinafter called "Mortgagor", and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA a corporation of the State of New Jersey, having its principal office at 745 Broad Street, Newark, New Jersey, hereinafter called "Mortgage",

WITNESSETH, that Mortgagor, for and in consideration of the sum of Seven Hundred Thousand and No/100— ($700,000.00—) Dollars, lawful money of the United States of America, to Mortgagor in hand paid by Mortgagee, the receipt of which is hereby acknowledged, and in order to secure the repayment thereof according to the promissory note hereinafter mentioned and also to secure the repayment of any further sum or sums advanced or paid by Mortgagee to or for the account of Mortgagor as herein provided, does hereby grant, bargain, sell, convey and confirm unto Mortgagee, its successors and assigns, forever, all the following described real property lying and being in the County of Polk, State of Oregon, and described as follows, to wit:

As described in the six riders attached hereto, which are identified by the signature of Asa L. Lewelling, one of the mortgagors above.

[Description of property by metes and bounds and standard mortgage clauses omitted.]

• • • • • • • • •

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17. Upon a full and complete performance of the covenants and agreements herein contained this mortgage shall be null and void, otherwise it shall be and remain in full force and effect.

In Testimony Whereof, Mortgagor has set his hand and seal the day and year first above written.

/s/ Asa L. Lewelling
Asa L. Lewelling

/s/ Betty L. Lewelling
Betty L. Lewelling

/s/ George A. Jones
George A. Jones

/s/ Jean Hanover Jones
Jean Hanover Jones

/s/ David F. Kennedy, Jr.
David F. Kennedy, Jr.

/s/ Margaret A. Kennedy
Margaret A. Kennedy

/s/ Asa L. Lewelling
Asa L. Lewelling

/s/ George A. Jones
George A. Jones

/s/ David F. Kennedy, Jr.
David F. Kennedy, Jr.
Partners d.b.a.
Green Villa Farms

BOOK 208 PAGE 31

Exhibit A-2

BARGAIN AND SALE DEED

The STATE OF OREGON acting by its Board of Control conveys to ASA L. LEWELLING, GEORGE A. JONES and DAVID F. KENNEDY, JR. a partnership doing business under the assumed name and style of GREEN VILLA FARMS, all that real property situated in Polk County, Oregon, described as:

[Description by metes and bounds omitted.]

* * * * * * * * * * *

SAVE AND EXCEPT that portion of the above described tracts of land lying within the boundaries of public roads and highways.

Dated this 23rd day of June, 1967

STATE OF OREGON
Acting by and through
the Board of Control

/s/ TOM MCCALL
Tom McCall, *Governor*

/s/ CLAY MYERS
Clay Myers,
Secretary of State

/s/ ROBERT W. STRAUB
Robert W. Straub,
State Treasurer

Attest:

/s/ CARL A. THOUGHRAND
Secretary

BOOK 208 PAGE 33

State of Oregon }
County of Marion } ss.

On this 23rd day of June, 1967, personally appeared before me the Honorable Tom McCall, Governor, the Honorable Clay H. Myers, Secretary of State and the Honorable Robert W. Straub, State Treasurer, and acknowledged the foregoing instrument to be their voluntary act.

/s/ JUANITA D. OLSON
(Seal) *Notary Public for Oregon*

My commission expires: February 29, 1968

BLEED THROUGH POOR COPY

Exhibit A-3 to Cheasty Affidavit

BOOK 202 PAGE 288

CONTRACT OF SALE

WHEREAS, for sometime last past THE STATE OF OREGON has owned a farm in Polk County, Oregon, known as COLONY FARM; that the State of Oregon acting through its Board of Control decided to put said property up for sale at a price of One Hundred Seventy-five Thousand Dollars ($175,000.00); that said property was advertised for sale at that price for cash and no bids were received. Subsequently said property was advertised for sale on terms of 29% down, balance amortized over 20 years, unpaid balance to bear interest at the rate of 5½% per annum and no bids were received on those terms, and subsequently said property was advertised at the said price of $175,000.00 on terms of $25,000.00 down, balance amortized over 20 years, interest on deferred balance at 5½% per annum and a partnership known as GREEN VILLA FARMS was the sole bidder at that price. That the said State of Oregon has accepted said bid and the said parties herewith intend to express said bid and acceptance in the form of a written contract of sale. Now, therefore,

THIS AGREEMENT made and entered into this 1st day of February, 1966, by and between THE STATE OF OREGON acting by and through its Board of Control, party of the first part hereinafter called "Seller" and Asa L. Lewelling, George A. Jones and David F. Kennedy, Jr., a partnership doing business under the assumed name and style of GREEN VILLA FARMS, party of the second part hereinafter called "Buyer",

WITNESSETH:

That in consideration of the prompt payment by Buyer unto Seller of the price hereinafter provided and of the full and timely performance by Buyer of the covenants,

terms and conditions of this contract on its part to be kept and performed, Seller hereby agrees to sell unto Buyer and Buyer hereby agrees to purchase from Seller certain real property more particularly described as follows:

[Description by metes and bounds omitted.]

* * * * * * * * * *

This sale is made upon terms and conditions as follows:

1. Price:

The price for the above described real property and which Buyer hereby covenants to pay unto Seller in the manner hereinafter provided is the sum of One Hundred Seventy-five Thousand Dollars ($175,000.00) payable as follows: Twenty-five Thousand Dollars ($25,000.00) upon execution hereof, balance in annual payments of Twelve Thousand Five Hundred Dollars ($12,500.00) each, the first of which shall be due and payable on December 31, 1966, with a like payment due on each succeeding December 31st until the entire purchase price, including both principal and interest, is paid in full, provided, however, that the entire purchase price shall be paid on or before December 31st of the twentieth year, (1986).

The unpaid balance of the purchase price shall bear interest at the rate of five and one-half per cent (5½%) per annum and each payment shall be applied first to the payment of interest then due, overplus, if any, applied to principal. Interest on all unpaid balances shall commence on the date of execution of this contract.

Buyer shall have the privilege of incrasing any annual payment or prepaying the entire balance at any time; provided that no additional payments shall be credited as

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regular future payments nor excuse Buyer from making the regular annual payments provided for in this contract.

2. Possession:

Buyer shall be entitled to possession of the premises immediately upon the execution of this contract by the parties.

3. Taxes:

All taxes levied against the above described property for the current tax year (1965-1966), paid by the Seller in the amount of Two Thousand Five Hundred Seventy-six and 70/100 Dollars ($2,576.70), shall be prorated between the Seller and Buyer as of February 1, 1966. Buyer agrees to pay when due all taxes whic are hereafter levied against the property and shall furnish Seller with copies of tax receipts for taxes paid in all subsequent years.

4. Liens:

Buyer covenants to keep the described property free from lens and encumbrances of any kind or nature whatsoever save those permitted in writing by Seller.

5. Title and Title Insurance:

Seller makes no warranties concerning the title and will not provide title insurance. However, Seller hereby covenants and agrees to sell and will convey all of its rights, title and interest in and to the described real property and appurtenances, including water rights.

6. Conveyance:

When Buyer shall have fully paid the entire purchase price with accrued interest thereon, Seller will, upon the surrender of Buyer's copy of this contract, convey unto

Buyer by bargain and sale deed the above described real property, free and clear of any encumbrances or defects in title suffered or permitted by Seller subsequent to the date hereof.

BOOK 202 PAGE 292

7. Assignment:

Buyer shall not assign this contract, his rights thereunder or in the property covered thereby without the written consent of Seller.

8. Improvements, Alterations, Repairs and Waste:

Buyer agrees that all improvements now located or which shall hereafter be placed on the premises, shall remain a part of the real property and shall not be removed at any time prior to the expiration of this contract without the written consent of the Seller. Buyer shall not commit or suffer any waste of the property, or any improvements thereon, or alterations thereof, and shall maintain the property, and all improvements thereon, and all alterations thereof, in good condition and repair. Buyer shall not otherwise make or cause to be made any improvements or alterations to the property without first obtaining the written consent of the Seller, provided, however, that Buyer may do land clearing and leveling to make the property better suited for cultivation or make more acres tillable and in doing so may cut, and bulldoze trees, shrubs and brush and fill swales, sloughs and ravines.

9. Insurance:

Buyer shall procure and keep in full force and effect during the life of this contract a policy of fire insurance with extended coverage upon the improvements on the described real property to the extent of their full insurable value, loss payable to Seller as its interest may appear at the time of said loss. Buyer shall furnish to Seller a copy of all policies of fire insurance so procured.

10. Default Provisions:

In the event that Buyer shall fail to perform any of the terms of this contract, time of payment and performance being of the essence, Seller shall, at its option, subject to the requirements of notice as herein provided, have the following rights:

(a) To foreclose this contract by strict foreclosure in equity.

(b) To declare the full unpaid balance of the purchase price immediately due and payable.

(c) To specifically enforce the terms of this contract by suit in equity.

(d) To declare this contract null and void as of the date of the breach and to retain as liquidated damages the amount of the payment theretofore made upon said premises and all improvements or fixtures placed on the premises. Under this option all of the right, title and interest of Buyer shall revert and revest

in Seller without any act of re-entry or without any other act by Seller to be performed, and Buyer agrees to peaceably surrender the premises to Seller, or in default thereof Buyer may, at the option of Seller, be treated as a tenant holding over unlawfully after the expiration of a lease and may be ousted and removed as such.

Buyer shall not be deemed in default for failure to perform any covenant or condition of this contract, other than the failure to make payments as provided for herein, until notice of said default has been given by Seller to Buyer and Buyer shall have failed to remedy said default within 30 days after the giving of the notice. Notice for this purpose shall be deemed to have been given by the deposit in the mails of a certified letter containing said notice and addressed to Asa L. Lewelling at 1001 Capitol Tower, Salem, Oregon 97301. Notice to Buyer, Asa L. Lewelling, shall constitute notice to all the Buyers.

If Buyer shall fail to make payment as herein provided and said failure shall continue for more than 10 days after the payment becomes due, Buyer shall be deemed in default and Seller shall not be obligated to give notice to Buyer of a declaration of said default.

If Seller shall bring suit or action upon this contract for damages for the breach of the contract or for recovery of possession of the described real property or for specific performance of this contract, the Seller, if the prevailing party in said suit or action, shall be entitled to such sum as its attorney's fees as the court hearing said suit or action shall adjudge to be reasonable.

11. Waiver:

Waiver by Seller of the prompt performance of any term or condition of this contract at any given time shall not be construed as a waiver of prompt and timely performance at any subsequent time and despite any prior waivers or indulgences Buyer shall at all times be held to the strict and timely performance of this contract and no notice or demand will be necessary to reinstate buyer's obligation for such strict and timely performance.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on this 22 day of February, 1966.

BOOK 202 PAGE 294

STATE OF OREGON, acting by and through the Oregon State Board of Control

/s/ MARK O. HATFIELD
Governor

(Seal)

/s/ TOM MCCALL
Secretary of State

/s/ ROBERT W. STRAUB
State Treasurer

"Seller"

GREEN VILLA FARMS,
a partnership
/s/ ASA L. LEWELLING
Asa L. Lewelling
/s/ GEORGE A. JONES
George A. Jones
/s/ DAVID F. KENNEDY, JR.
David F. Kennedy, Jr.
"Buyer"

STATE OF OREGON }
County of Marion } ss.

On this 22nd day of February, 1966, before me appeared the Honorable Mark O. Hatfield, the Honorable Tom McCall, and the Honorable Robert W. Straub, personally known to me to be the Governor, the Secretary of State and the State Treasurer, respectively, of the State of Oregon, comprising the Oregon State Board of Control, who have executed the foregoing instrument and acknowledged to me that they have executed the same freely and voluntarily in their capacity as members of the Oregon State Board of Control.

/s/ JUANITA D. OLSON
(Seal) *Notary Public for Oregon*

My commission expires: 2-29-68

STATE OF OREGON }
County of Marion } ss.

On this 22 day of February, 1966, personally appeared the above-named Asa L. Lewelling, George A. Jones and David F. Kennedy and acknowledged the foregoing instrument to be their voluntary act and deed.

/s/ ROSEMARY SIEFARTH
(Seal) *Notary Public for Oregon*

My commission expires: 1-30-68

Exhibit A-4

BOOK 17 PAGE 17

Loan No.

ARIZONA-COLORADO-IDAHO-NEW MEXICO
OREGON-UTAH-WASHINGTON

MORTGAGE

THIS MORTGAGE, Made this 17th day of May, A.D. nineteen hundred and seventy-one, by and between Asa L. Lewelling, George A. Jones and David F. Kennedy, Jr., Partners d.b.a. GREEN VILLA FARMS and Asa L. Lewelling and Betty L. Lewelling, husband and wife; George A. Jones and Jean Hanover Jones (sometimes known as Jean M. Jones), husband and wife and David F. Kennedy, Jr. and Margaret A. Kennedy, husband and wife, of the county of Polk in the State of Oregon, hereinafter called "Mortgagor", and

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

a corporation of the State of New Jersey having its principal office at 745 Broad Street, Newark, New Jersey, hereinafter called "Mortgagee",

WITNESSETH, that Mortgagee, for and in consideration of the sum of Three Hundred Forty-Five Thousand And No/100 ($345,000.00) Dollars, lawful money of the United States of America, to Mortgagor in hand paid by Mortgagee, the receipt of which is hereby acknowledged, and in order to secure the repayment thereof according to the promissory note hereinafter mentioned and also to secure the repayment of any further sum or sums advanced or paid by Mortgagee to or for the account of Mortgagor as herein provided, does hereby grant, bargain, sell, convey and confirm unto Mortgagee, its successors and assigns, forever, all the following described real property lying and being in the County of Polk, State of Oregan, and described as follows, to wit:

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As described in the seven riders attached hereto, which are identified by the signature of Asa L. Lewelling, one of the mortgagors above.

[Description and Standard Mortgage Terms Omitted]

BOOK 17 PAGE 27

IN TESTIMONY WHEREOF, Mortgagor has set his hand and seal the day and year first above written.

/s/ ASA L. LEWELLING
Asa L. Lewelling

/s/ BETTY L. LEWELLING
Betty L. Lewelling

/s/ GEORGE A. JONES
George A. Jones

/s/ JEAN HANOVER JONES
Jean Hanover Jones

By: /s/ GEORGE A. JONES
Her Attorney in Fact

/s/ DAVID F. KENNEDY, JR.
David F. Kennedy, Jr.

/s/ MARGARET A. KENNEDY
Margaret A. Kennedy

/s/ ASA L. LEWELLING
Asa L. Lewelling

/s/ GEORGE A. JONES
George A. Jones

/s/ DAVID F. KENNEDY, JR.
David F. Kennedy, Jr.

Partners D.B.A.
GREEN VILLA FARMS

Exhibit A-5 to Cheasty Affidavit

DEPARTMENT OF VETERANS' AFFAIRS

July 29, 1965

To: H. B. Woody
FROM: D. J. Mason

Pursuant to your request, I have made an appraisal of the Colony Farm located in Polk County, Oregon.

The appraisal has as its purpose the estimation of MARKET VALUE as of July 28, 1965. The property rights appraised are fee simple ownership assuming no indebtedness against the property.

As a result of my investigation and analysis described in this report which consists of six pages and three exhibits, I am of the opinion that the MARKET VALUE of the subject as of July 28, 1965, is

ONE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS
($175,000.00)

A supplemental report included consists of two pages stating estimates of value for segregated parcels of the property. In my opinion the sum of these aggregate values as of July 28, 1965, is

ONE HUNDRED SEVENTY-SEVEN THOUSAND TWO HUNDRED FIFTY DOLLARS
($177,250.00)

I certify that I have personally inspected the property and considered the factors affecting value, that I have no interest in the property, present or contemplated and that the value found is in no way affected by the fees received.

Respectfully Submitted,

/s/ D. J. MASON
D. J. Mason

DJM: cr

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, by and through its State Highway Commission, *Plaintiff-Respondent,*

v.

DELONG CORPORATION and THE TRAVELERS INDEMNITY COMPANY, *Defendants-Appellants.*

Affidavit of Bert B. Rand

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss:

BERT B. RAND, being duly sworn, deposes and says:

1. I am a member of the Bar of the U. S. Supreme Court and a practicing attorney with offices at 1730 K Street, N.W., Washington, D. C. I was admitted to the Circuit Court for Marion County *pro hec vice* as associate counsel in the captioned case, and I am acquainted with the record in this case.

2. I believe that the Trial Court relied chiefly, if not exclusively, on Plaintiff, Oregon's, Exhibits 113 and 448 in rendering judgment for Plaintiff based on Plaintiff's allegation that it had properly terminated Defendant, DeLong's, contract because Defendant was at fault in pouring defective seals at Pier 169 of the Astoria Bridge.

3. We had serious doubts, beginning when these Exhibits 113 and 488 were introduced, as to the validity of their identification and as to their origin and identity. This applies especially to Exhibit 488, which was offered in rebuttal near the end of tral, to overcome the Plaintiff's own official laboratory reports (Defendant's Exhibit A-15), obtained by Defendant late in the proceedings.

4. After the close of the trial, my associates, investigators employed by us, and I, continued a search to ascertain any new facts concerning these exhibits and related matters. Potential witnesses not available at the trial were

sought and interviewed when found; independent consulting engineers studied and analyzed information obtained and the exhibits were submitted to an expert questioned-document examiner. Respite diligence, it was not until a few weeks ago that we decided that our investigation had brought us to a point where it could be responsibly alleged that these exhibits had been improperly offered.

5. I believe that these exhibits were admitted on the basis of incorrect testimony and that the Trial Court would not have admitted or given weight to these exhibits if the facts as to their origin and identity had been available to him.

6. Attached as Exhibits A and B, respectively, are copies of the results of document examination to date of Plaintiff's Exhibits 113 and 488, submitted in support of the foregoing statements.

FURTHER AFFIANT SAYETH NOT.

/s/ BERT B. RAND
Bert B. Rand

SUBSCRIBED and sworn to before me, this 29th day of November, 1972.

/s/ LOUISE G. BURROUGHS
Notary Public, D. C.

My Commission Expires September 30, 1975

Exhibit A to Rand Affidavit

CONFIDENTIAL INVESTIGATION REPORT

Re: Questioned Documents
File No. 2-131-W

November 22, 1972

Re: Examination of Documents

For: Trammell, Rand, Nathan & Bayles, Attorneys-at-Law, 1730 K Street, N.W., Washington, D. C. 20006

Subject: Exhibits # 113-123 (with particular reference to P. 19, Exhibit # 113) from case of:

Oregon v. DeLong Corporation, et al.

Pursuant to your request we have at various times examined and tested this document.

Enclosed is a compilation of the results as determined by the Document Examiner.

Also enclosed is a statement of the qualifications of the Document Examiner.

John T. Lynch Company

by /s/ R. E. Cahill

Report # 1

The entries in the Resident Engineer's Diaries # 28-38, Pl. Exhibits 113 to 123 inclusive, and Pool's Diary, were examined, with particular reference to page 19 of # 28, Ex. 113 by Larry P. Peterson.

The purpose of the examinations was to discover any evidence of the actual date of entries as contrasted to the date recorded (ostensible date), and evidence which might be present as to who made entries as contrasted with ostensible writers.

It was found that entry writings, particularly those signed "Larry Peterson or LLP" (as on page 19, # 28, Ex. 113) contain evidence of execution by the ostensible writer, using other entries as unquestioned examples.

With reference to the actual date when entries were made the date under the signature "Larry Peterson" at the top of page 19, # 28, Ex. 113, ending the entry for 12/15/63 begun on the previous page, "12/15/63" shows that the two figure was written over "1", probably a mistake. The pencil of the entries and signature and date equate with each other except that at the end of the entry "(APROX.)" was entered with another pencil, lighter and making lines not as wide. This is evidence of adding the quoted "(APROX.)" not at the time of making the 12/15/63 entry but at a later time.

In an effort to discover evidence of the actual time the pencil strokes were compared with other entries, such as that immediately below dated 1/10/*63*/64. It will be noted this year was changed and "LPP" initials placed alongside.

This entry is with a lighter pencil than the 12/15/63 entry but does not fully correspond to "(APROX.)" above. Entries most similar as to the pencil, were found on many pages of all of these diaries, signed "M.H. 4/9/64". This includes Pools Diary and in # 29, Ex. 114 an entry was found on page 25 under the inserted entry "M.H. 4/9/64" "NO ACTIVITY IN RIVER EXCEPT PUMP COFFERDAM SEE BARTELL DIARY 8-12-64 L.P.P." The pencil used for this Peterson addition matches that of "(APROX)" page 19, Ex. 113, # 28.

It appears to be clear that the M.H. and LPP insertions were not made contemporaneous with the main entries under which they were inserted. They represent additions in the nature of comments, frequently giving a reference to an entry in some other diary. The date of these insertions

as to "M.H." indicates this man reviewed the diary entries at one time "4/9/64" presumably, considerably later than the dairy entry, and added the insertion. As the insertion on Ex. 114, page 25 of "M.H." dated "4/9/64" existed before the insertion of "L.P.P." which follows, the insertion followed that of M.H. and is dated "8-12-64" indicating that this information inserted was not contemporaneous with the event described and that L.L.P. like M.H. was engaged in reviewing the diary entries and adding his statement so long after the event itself.

This procedure is inconsistent with admission in evidence as a record contemporaneous with the event and is actually in violation of company instructions printed on the diaries. As these are State Highway Engineer diaries the instructions were those of that department. As indicated earlier in this report these "M.H." insertions dated 4/9/64 are evidence of the review of the diaries 4/9/64 which add references to diary entries of other workers.

The diary entry at the bottom of page 19, # 28, Ex. 113, signed "Larry Peterson" reads "BETWEEN DEC. 12, 1963 AT 12:45 P.M. AND DEC. 15, 1963 AT 3:30 P.M." The last sentence of this entry occupying several lines is spaced with reference to the signature so as to raise the question whether it originally ended without the last sentence and was signed while sometime later the last sentence was added being carefully fitted into the space which required the word "out" to be placed to the left of the horizontal spacing of the rest of the paragraph indentation from the left edge of the page. The sentence reads as though complete without this word and it was obviously added after the sentence was completed extending the meaning but not otherwise changing the last sentence.

The spacing of the alleged date of entry of the whole paragraph "1/10/*63*-64 L.L.P." is such as to indicate it was entered before the last sentence was written, that sentence being added after and fitted around the date and sig-

nature. Hence it is clear that the whole entry does not conform to notes contemporaneous with the events recorded, the whole entry describing events from Dec. 12 to 3:30 P.M. Dec. 15. The dates are not consistent with the statement in the entry that the day shift started a 2:00 A.M. Dec. 12 and lasted until 3:30 P.M. since this would be Dec. 13 not 15 or even 14, while the date of making the entry is given as 1/10/*63*-64, while the last sentence was added after.

To gain such evidence as may be obtained regarding the pencils used to make these changes and insertions, the books were submitted to Mrs. Bette Hammon, Chemist Technician at Georgetown University Reference Laboratory, to determine if possible whether ingredients of the graphite compound composing the writing material in the pencils used is consistent or inconsistent with use of the same pencil, for instance to strike out or change digits in the date, or to add the last sentence in the Peterson entry at the bottom of page 19 (Ex. 113) or the word (APPROX.) at the end of the top entry which started on the previous page.

(It should be noted that the questioned entry at the bottom of page 19 is irregular in that it includes the date 12/15 already the subject of the preceding entry which started on the previous page, hence must be considered an extension of that entry or an explanation and extension added later not earlier than 1/10/64.)

Since it is clear that Peterson and M.H. were reviewing diary entries at a much later time than the date of the entry under which comments by M.H. and Peterson were inserted under diary entries of other employees, that of Peterson in Ex. 114, page 25, being dated 8-12-64; it is clear that the second entry for 12/15/63, on Page 19, in the manner in which it was constructed is consistent only with a desire to add to the 12/15/63 record, made at the end of the shift and so dated 12/15/63, the statements of which it is composed, the first entry for that day confining itself to bags of cement making no mention of the loss of the seal.

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This was added ostensibly 1/10/64, originally without the last line and then this was added as though originally part of the whole composition but actually being necessary to fit it in around the ostensible date.

This leaves the contemporaneous nature of the whole entry very much in question.

The results of the chemical analysis have not yet been received the books having been returned after taking samples of the lines to test. As soon as these results are known an additional report will be prepared summarizing the evidence described above and the tests.

* * * *

REPORT # 2

The examination of the diary entries as related to Exhibits # 113-123 has been completed. In order to discover any evidence present in the writing lines consisting of differences in the chemical and material composition of the pencils used, samples of questioned entries were removed by punching out small lines portions. The pencil deposits were then subjected to radiation beams projected through the material to record absorption or excitation effects measuring the response by the spectrum. The instrument used was a very delicate spectrophotofluerometer of a new type. In addition to tests of the actual diary entries preliminary tests of similar known writing materials were made to furnish knowledge of what tests of the questioned material might show.

Although it was found that a relatively large sample must be used to separate writing materials of this kind (pencil) by the composition, at the conclusion of the research experiments the questioned entry materials were nevertheless tested.

The results indicate the apparatus used was unable to distinguish the writing materials, the reason apparently being insufficiency of materials to test.

Research experiments with known materials (pencils) and the questioned entries, sampled in this way, by means of chromatography failed also. In this case the difficulty was caused by inability to elute (dissolve) ingredients of the writing lines.

The conclusions reported are therefore to be considered final, namely:

1. The entries on page 19, Plf. Ex. 113, Diary 28, purportedly written by Larry P. Peterson are concluded to have been written by him.

2. The insertion line 5 "(APPROX.)" was added at a later date than 12/15/63. Evidence is the change in pencil. The actual date cannot be determined.

3. The entry beginning line 8 "12/15/63—BETWEEN DEC. 12, 1963 AT 12:45 A.M. AND DEC. 15, 1962 AT 3:30 P.M.—" purports to have been written 1/10/64 as shown by the repetition of the date at the end. This is a violation of instructions printed in the inside of the diary cover which requires that a line be drawn after making the entry at the end of a shift, to prevent additions of this kind. Instead instructions require such additions to be made on the actual date of the entry, that is in this case the page of a diary book covering 1/10/64. This would be Ex. 115, book 30, pages 20, 21, 22, covering this date. At the end of the last entry for 1/10/64 (actually entered 1/15 according to the date at the end of the entry) appears an insertion calling attention to Polls diary. This exists where the line striking out all spaces below the 1/10 entry is required by instructions to be. Similar insertions are on the next page 23, referring to Pools diary, dated 4/9/64.

It is obvious through examination of all of the diaries, that instructions were not followed, additional entries being present and open spaces below entries which should have been struck out, being used to insert comments, information and references at much later dates not contemporaneous with the work shifts just finished.

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Returning to page 19, Ex. 113, book 28, it is clear that the addition in the second entry for 12/15/63, made purportedly 1/10/64, in the space which should have been struck off to prevent such additions, according to instructions, was for the purpose of recording events not disclosed 12/15/63 by Peterson. His entry that date records the numbers of bags.

According to the plain statement in the second entry, claimed to have been made 25 days later, 1/10/64, during an interval of more than one shift (Dec. 12-15, 3:30 P.M.) seals were broken and water gushed between the flange joints.

The last sentence in this additional 12/15 entry, made 1/10 "Also, at no other time—" refers to cement boiling out, and the word "out" was not in the sentence when first written but was added later.

The accuracy of this questioned entry as a whole and as construed in violation of rules, at that late date, cannot be accepted as a contemporaneous record and appears to be in the nature of hindsight, or review of the memory, such as is indicated by the insertions of "M.H." and Peterson in the various diaries in blank spaces not bearing entries or struck out, actually dated 4/9/64 or 8/12/64. Aside from such insertions diary entries as a whole present no evidence other than page 19, Ex. 113 of non-contemporaneous entries.

* * * *

Exhibit B to Rand Affidavit

CONFIDENTIAL
INVESTIGATION REPORT

Re: Questioned Documents
File No. 2-131-W

November 22, 1972

Re: Examination of Documents

For: Trammell, Rand, Nathan & Bayles, Attorneys-at-Law, 1730 K Street, N.W., Washington, D. C. 20006

Subject: Exhibit # 488 (37 pages) from case of: Oregon v. DeLong Corporation, et al.

Pursuant to your request we have at various times examined and tested this document.

Enclosed is a compilation of the results as determined by the Document Examiner.

Also enclosed is a statement of the qualifications of the Document Examiner.

John T. Lynch Company

by /s/ R. E. Cahill

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Summary

Analysis of Writings Columbia River Bridge Batching Records—Plaintiff's Ex. 488

12-3-63 = 12-15-63

1. 12-3-63 3:00 PM Caption line A, C, D & Date and under printed column headings line 1 are one pencil, line 2, 3, another pencil line 4 signature of Mitzel another. Entry line 7 Changed over to Seal written by another writer. Line 9 to end another writer over signature Harold Freeman except additional in remarks column are different and there are small figures additional in remarks column two figures erasures and changes. Date re-written.

2. 12-3-63 6:00 PM Caption lines A, C, D by writer of page 1 caption except date scratched out and re-written by a different writer and barge number by a different writer. Heading of column 3/8-1/4 scatched out and changed to 1 1/2-1 where 1626 inserted (see evidence of a different writer on pages starting number 26). Under printed column headings line 1 figures by different writer from entries below. Lines 2-6 incl. by writer of Freeman signature but entries beginning line 7 just above by another writer and column Remarks figures (two sets) unlike other writings. Date was re-written.

3. 12-3-63 9:50 P.M. Caption writings unlike entries below column headings and "1626" under 1 1/2-1 column unlike other entries line 1 or below which through line 10 purport to be by Harold Freeman. Entries line 10 to signature Start by another writer and figures in Remarks column differ and show erasures and changes.

4. 12-4-63 9:45 A.M. Pencil caption writings lines B, C, D, and line 1 under column headings unlike other entries on page to signature Start which in different pencil from entries above it. Two sets of entries in remarks the prominent figures being different from adjacent entries in other columns.

5. 12-4-63 8:27 P.M. Caption entries by writer caption entries page 4 all pencil unlike entries line 1 under column headings. Writings line 2-14 incl. by one writer while succeeding entries by another writer until end signed Freeman and under remarks entries before line 14 different writer from those below to end.

6. 12-5-63 8:10 P.M. Caption in ink by writer caption entries pages 4, 5, except barge number. Additional added entries in caption in pencil by same writter and insert pencil by another writer above date. Line 1 under column headings in ink like in caption. Change in figures under "Sand", 1-4, and Cement. Entries lines 2 to end (no signture on sheet) are in pencil and there are two sets of figures under remarks.

7. (Marked 6) 12-6-63 (changed from 5th to 6 by scratching out). Caption entries ink by writer caption entries pages 4, 5, and insert above date in pencil by another writer. Line 1 under column headings same ink as captions same writer but not writer of entries below this line. Lines 2 to end signed Freeman, line 2 words erased and re-written by another writer lines 2 and 3.

8. (Marked 7) 12-6-63 8:50 A.M. Caption entries pencil same as line 1 under column headings except insert different pencil last digit barge number and insert above date. Line 3 through 12 different pencil from caption and line 1 also different from line 14 entries down to signature Start latter entries by different writer.

9. (Marked 8) 12-6-63 6:08 (P.M.) ink caption entries and line 1 except pencil insert above date total bags changed 536 to 535 different writer from entries line 2 to end signature Start. 2 sets figures in Remarks those on line 4 erased and changed. Two writers in ink of caption entries.

10. 12-7-63 (day scratched out and changed) ink caption entries and lines 1 and 2 under column headings different

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ter from pencil entries after ink hour 12:01A to end of et and signature Harold Freeman. (Line 3 to end of et).

1. 12-7-63 Pencil caption entries and line 1 except insert ve date in pencil another writer. Line 2 to line 8 signa- e of Harold Freeman writing thereafter in pencil to sig- ure. H. Mitzel different writer.

2. 12-7-63 9:40A In remarks column one figure scratched and written over while another is very small and nearly sed.

3. 12-7-63 1:50 PM Pencil entries captions and lines un- column headings 1 to 6 signed Mitzel. With different cil figure in remarks column erased and changed. Line end different writing to signature Start.

4. 12-7-63 7:25 P Ink entries captions and lines 1-4 . (except that pencil nsert above date entry by another ter)—lines 5 to end pencil to signature Start.

5. 12-8-63 12:40 A.M. Ink caption entries continue line 1 er column headings except there are two pencil inserts aption above date by a different writer not the writer of 2 to end and signature Harold Freeman.

6. 12-8-63 6:00 AM pencil caption entries one writer ex- t insert above date another writer. No entries under mns of mix content and pencil entries line 1 to line 3 pencil another pencil lines 5, 6 to signature Harold eman. Line 7 to end another pencil and writer to signa- e at end Mitzel.

7. 12-8-63 11:50 A.M. Pencil captions continue line 1 er column headings line 1-3 incl. Line 4 another pencil e writer to line 17 signature Mitzel. Line 19 different cil and writer to end signature Start.

8. 12-8-63 5:10 PM ink caption entries, line 1 under col- n headings and time entries line 3 and 5 one writing act entries thereafter to end in pencil to signature Start

continue. In remarks column are two separate sets of figures with addition sum in different pencil at bottom.

19. Caption in pencil "Pier # 169-B Batching Record" is summary sheet. Caption one pencil, entries below to end another pencil. Erasures and changes line 4 under column headings and for totals at bottom. All same handwriting as 18 signed Start.

20. 12-11-1963 1:05 P.M. Pencil caption entries and line 1 under column headings one pencil. Line 2 different pencil light. Mix figures under line 1 figures (both omitting 1 1/2-1) different writer. Remaining entries to signature Mitzel using same pencil used for captions. After Mitzel signature using different pencil "Releived by W.P.S." to bottom end no signature made by writer of entries other sheets over Start signature.

21. Ink captions "Roto Bag Record" and all entries in ink mostly drawn over pencil entries, sometimes changing these, are similar writings over signatures Start on other sheets.

22. 12-11-63 7:10 P.M. Ink caption entries continue for line 1 under printed column headings show writing features over Start entries other sheets. Pencil entries under column headings thereafter to signature Start, same writer. Last two lines include signature Harold Freeman, different pencil.

23. 12-12-63 12:30 A.M. Ink caption entries continue through line 1 under column headings by same writer as writings over Start signature other sheets. Pencil entries under column headings line 2 to end at bottom signed Harold Freeman, written by different writer from captions and line 1.

24. 12-12-63 6:15 A.M. Pencil caption writings continue through lines 1, 2, 3. Different pencil same writer line 4 to signature Harold Freeman line 7. Different pencil, differ-

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ent writer line 9 to end and signature Mitzel. Two pencils, different writers under "Water" (Remarks) column.

25. 12-12-63 11:00 A Pencil caption entries. Different pencil line 1 entries under column headings. Different pencil line 2 to end and signature Mitzel.

26. 12-12-63 3:25 P Pencil caption entries continue lines 1-4 under printed column headings one writer but under 1 1/2-1 figures "1626" written by another person different pencil and entry above date scratched out and insert change with another pencil by another writer. After signature Mitzel on line 7 all entries by another writer another pencil continue to bottom and signature W. P. Start.

27. 12-12-63 12:15 P Ink caption entries continue on line 1 under printed column headings except under 1 1/2-1 figures are in pencil by different writer. Line 2 different pencil through line 7 signature W. P. Start. Different pencil different writer line 8 to end and signature Harold Freeman at bottom.

28. 12-13-63 6:31 A.M. Pencil caption entries continue one writer line 1 under column headings except date and insert over date another pencil and writer and under column heading "1 1/2-1 different pencil and writer "1626". Line 2 same pencil. Line 3 through line 6 different pencil to signature Harold Freeman. Line 9 to end and signature Mitzel different pencil and writer. Changes in remarks column by scratching out.

29. 12-13-63 10:15 A.M. Two pencils used by 1 writer for caption entries include entries line 1 under column headings except different pencil, different writer under heading "1 1/2-1" (1626 same writer as similar circumstances other sheets). Line 1 to end and signature Mitzel same pencil and writer.

30. 12-13-63 2:45 P.M. Pencil captions continue line 1 under column headings except change in total bags over

date, different pencil and under column "1 1/2-1" different pencil and writer "1626" (same writer as other sheet similar circumstances.) Line 2 to line 7 signature Mitzel one writer. Line 8 to end and signature W. P. Start 1 pencil and writer.

31. 12-13-63 8:50 P.M. Ink caption entries and line 1 except pencil insert above date changing total bags different pencil and writer and under column "1 1/2-1" figures "1626" written by another writer different ink. Line 2 under "Sand" and "1-4" are pencil insertions by different writer different pencil. Line 3 through line 10 one pencil to signature Start. Line 11 to end different pencil to signature Harold Freeman.

32. 12-14-63 2:15 A.M. Ink caption entries continued on line 1 except insertion above date in pencil different writer and on line 1 under heading "1 1/2-1" are figures "1626" different ink and writer (same as similar circumstances other sheets). Line 2 pencil (different from pencil insertion above date) entries to end and signature Harold Freeman same writer as ink caption entries.

33. 12-14-63 6:50 A.M. Ink caption continues on line 1 and time line 2 except "Barge # 170" different writer and pencil insert above date is different writer and on line 1 under "1 1/2-1" the figures "1626" are written with different ink and different writer. Pencil entries lines 2, 3, 4, 5 to signature Harold Freeman by one writer and line 7 to end different pencil and writer to end and signature Mitzel.

34. 12-14-63 11:20 A. Pencil caption entries continuing through line 1 except different pencil Barge number and under "1 1/2-1" figures "1626" different pencil and writer (same as on other sheets same circumstances). Entries line 2 to end and signature Mitzel different pencil except line 3 insert different pencil and light entries different pencil below signature Mitzel under "Remarks".

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35. 12-14-63 4:10 P. Pencil entries caption continues line 1 except under "1 1/2-1" different pencil and writer of figures "1626". Line 2, 3 to signature Mitzel. Different pencil and writer, line 6 to end and signature Start.

36. 12-14-63 10:40 P. Ink caption entries continue line 1 except different ink and writer under "1 1/2-1" in figures "1626" same as in other sheets with similar circumstances. Pencil line 2-7 and signature Start. Different pencil line 8 to end including signature Harold Freeman and different writer.

37. 12-15-63 4:11 A.M. Ink captions continue on line 1 except different writer "BARGE # 173" and under "1 1/2-1" figures "1626" different writer and ink. Pencil entries line 2 to end and signature Harold Freeman.

REPORT # 2 — EXHIBIT # 488

With completion of the ink analysis concerning the captions at the top of the Columbia River Bridge log sheets and the number entries on line 1 under the printed columnar headings, data obtained by analysis can now be summarized as an addition to previous reports, particularly the summary report of July 18, 1970.

The need for this analysis developed when it was discovered that more than one writer wrote captions above the column headings on many logs, and the figures of line 1 describing the concrete mixes, particularly "1626" under "1 1/2-1", were, on many logs, written by a different writer than the writer who wrote the figures at the heads of the other columns.

The chemical ink analysis was attempted by chromatography through punching out minute line portions and then dissolving the ink. The caption and figure inks are black and were fluid, not ball point pen impressions. Thus they appear similar in composition. The appearance is that of drawing ink a suspension of carbon. It was found the ink samples did not dissolve.

Therefore this method was abandoned and tests were made by the spectrophotofluorometer. This projects a light beam through the ink lines and the paper, drawing automatically curves on graph paper which measure the light absorption as the spectrum changes. These curves are then compared to discover those which match and any which do not.

It was found the caption entries on logs numbers 7, 9, and 36 were written with different inks as indicated by divergence in their curves, the remainder of the logs being similar in ink.

It was found the numbers line 1 are different on logs 14 and 36 in the inks used.

In general the inks of the other entries are the same.

Observational studies of "1626" entries under "1 1/2-1" where differences in figure designs were discovered, as compared with adjacent numbers heading the other columns, indicate some differences in pens exist as well as in inks.

This indicates the time of entering "1626" was different from that of entering the other line 1 concrete mix entries. It is not possible to discover how long an interval occurred.

Dyes used in inks change in composition after being impressed on paper because of exposure to oxygen in the air and other aging factors. The results of the chemical tests therefore must be understood as defining conditions at the time of the tests only. Inks of the same composition impressed on paper at substantially long intervals react to disclose differences (at the same testing date) caused by differences in dates of writing sufficiently large to have caused changes (or have been different in composition when written).

The test results in this case therefore indicate substantial differences in time of entry or use of a different ink

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(where reported above as found different). This is as close to an estimate of when the entries were made as it is possible to reach in this case.

In many logs the caption entries above the column headings were made by one writer, not the writer of the shift entries line 2 on, indicating one person filled this portion in repeatedly for other workers who then made their entries by the times given, sometimes signing at the end of the shift. These writers of the shift entries on some logs added to the caption entries, sometimes particularly in bag totals above the date. Sometimes shift workers did write captions as well as hourly entries.

Figures under "Remarks" frequently differ from the writing of the shift worker and there are sometimes two sets of figures often by different writers.

The writings of Freeman, Mitzel and Start in the hourly reports whether signed by them or not were identified with their examples as a whole, and some captions written by Freeman and Mitzel were similarly identified. With regard to Start: his example and hourly entries in handlettering closely resemble the group of caption entries made by the writer not on the shift of that log; but at the same time examples of handletterings by other employees also resemble these captions. Because the captions are limited in amount, identification of the person who filled in captions in this group should await receipt of additional examples of possible writers, so as to study as exactly as possible the evidence available. This writer of group captions must be either Start or another person who writes very much like him.

Because of the evidence discovered it is my opinion the mix data figures and the captions written in the black inks, were not impressed day by day by the shift worker who made the first hourly entries as a custom and additions and changes were made in the mix data figures line 1.

Oregon Statutes

DISQUALIFICATION OF JUDGE

14.210 Disqualification of judicial officers for cause; application of section; waiver. (1) A judicial officer shall not act as such in a court of which he is a member in any of the following cases:

(a) When he is a party to or directly interested in the action, suit or proceeding;

(b) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;

(c) When he is related to any party, or to the attorney for any party, or to the partner or office associate of any such attorney, by consanguinity or affinity within the third degree;

(d) When he has been attorney in the action, suit or proceeding for any party.

(2) This section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the cases specified in paragraphs (c) and (d) of subsection (1), the disqualification may be waived by the parties, and, except in the Supreme Court, shall be deemed to be waived, unless an application for a change of the place of trial is made as provided by statute.

14.220 [Repealed by 1955 c. 408 § 2]

14.230 [Repealed by 1955 c. 408 § 2]

14.240 [Repealed by 1955 c. 408 § 2]

14.250 Disqualification of judge for prejudice; transfer of cause or calling judge; making up issues. No judge of a circuit court of the State of Oregon, including such judge when sitting in a department of probate or a department of domestic relations or a judge hearing or trying probate or

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a department of domestic relations or a judge hearing or trying probate or domestic relations matters or proceedings in counties in which such probate or domestic relations matters or proceedings are heard or tried by the circuit court or a judge thereof, shall sit to hear or try any suit, action, matter or proceeding when it shall be established, as provided in ORS 14.250 to 14.270, that such judge is prejudiced against any part or attorney, or the interest of any party or attorney appearing in such cause, matter or proceeding. In such case the presiding judge shall forthwith transfer the cause, matter or proceeding to another department of the same court, or call in a judge from another department of the same court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge to whom the cause has been assigned. [1955 c. 408 § 1(1)]

14.260 Affidavit and motion for change of judge; time for making; limit of two changes of judge. Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court, including matters or proceedings in a department of probate or a department of domestic relations in those counties where probate or domestic relations in those counties where probate or domestic relations matters or proceedings are heard or tried by the circuit court or a judge thereof, may establish the prejudice described in ORS 14.250 by motion supported by affidavit that the judge before whom the cause, matter or proceeding is pending is prejudiced against such party or attorney, or the interest of such party or attorney, so that such party or attorney cannot or believes that he cannot have a fair and impartial trial or hearing before such judge, and that

it is made in good faith and not for the purpose of delay, which affidavit shall be filed with such motion at any time prior to final determination of such cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after such cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office or another judge to preside over such cause, matter or proceeding, but no motion to disqualify a judge shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding, and no motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides, shall be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment. In judicial districts having a population of 100,000 or more, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270. No party or attorney shall be permitted to make more than two applications in any cause, matter or proceeding under this section. [1955 c. 408 § 1(2); 1959 c. 667 § 1]

14.270 Affidavit and motion in counties with presiding judge; time for making; limit of two changes of judge. In any county of the State of Oregon where there is a presiding judge who hears motions and demurrers and assigns cases to the other departments of the circuit court for trial, the affidavit and motion for change of judges to hear the motions and demurrers or to try the case shall be made at the time of the assignment of the case to a judge for trial or for hearing upon a motion or demurrer; oral notice of the intention to file the motion and affidavit shall be sufficent compliance with this section providing that the motion and affidavit are filed not later than the close of

the text judicial day; but no motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding; except that when a presiding judge assigns to himself any cause, matter or proceeding in which he has previously ruled upon any such petition, motion or demurrer, then in such case any party or attorney appearing in the cause, matter or proceeding may move to disqualify the judge after assignment of the case and prior to any ruling on any such petition, motion or demurrer heard after such assignment. No party or attorney shall be permitted to make more than two applications in any action or proceeding under this section. [1955 c. 408 § 1(3); 1959 c. 667 § 2; 1969 c. 144 § 1]

* * * * * * * * * *

17.250 Jury judges of the effect of evidence; instructions. The jury, subject to the control of the court, in the cases specified by statute, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

(1) That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

(2) That they are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds;

(3) That a witness false in one part of his testimony is to be distrusted in others;

(4) That the testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party with caution;

(5) That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence; that in criminal cases guilt shall be establish beyond reasonable doubt;

(6) That evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

(7) That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

* * * * * * * * * * *

41.360 Disputable presumptions. All presumptions other than conclusive presumptions are satisfactory, unless overcome. They are disputable presumptions, and may be controverted by other evidence, direct or indirect, but unless so overcome, the jury is bound to find according to the presumption. The following are of that kind:

* * * * * * * * * * *

44.010 Witness defined. A witness is a person whose declaration is received as evidence for any purpose, whether it is made on oral examination, by deposition or by affidavit.

* * * * * * * * * * *

Exhibit 113

Sunday, December 15, 1963 weather cold and cloudy rain
PM 6:15 A.M. Bagge

172 in with 12 bages when I arrived. Barge 170 standing by with 103 bages. 7:30 AM Barge 170 now in place with 103 bags 2172 cu. yds. at this time not counting waste. 9:30 AM moved tremie tub 70 southwest corner. 9:50 AM tremie tube moved batching operation back to normal. 11:00 AM slump 7" air 5% 2281.5 cu. yds. approx. 12:30 P.M. 3 cyl. slump 7¾" air 5%. 1:00 PM barge 171 arrived with 92 bage. 1:20 moved trimie tub. 1:35 P.M. operations back to normal; 3:30 P.M. finished; Barge 171 had 46 bages left on barge. Total yardage 2395.5 cu. yds. not counting waste approx.).

LARRY PETERSON
12/15/63

Between Dec. 12, 1963 at 12:45 A.M. and Dec. 15, 1963 at 7:30 P.M. Pier 169 East Coffer Dam Seal Pour.

On my day shift which started at 7:00 A.M. and lasted till 3:30 P.M. I noticed more than once that the seal was lost. During this time the seal was lost I noticed water gushing between the flange joints of the tremie tub. Also I noticed cement boiling up from the bottom, which made the water milky color. This was fixed right away by DeLong putting a rubber ball in the tremie tub, this regained the seal when the next bucket was poured down the tremie tub. Also, at no other time did I notice cement boiling on top of the surface or water gushing out between the flanges.

LARRY PETERSON
1/10/69

DEFENDANT'S EXHIBIT H. 59323

PLAINTIFF'S EXHIBIT 59323

OREGON STATE HIGHWAY DEPARTMENT

Order for Extra Work

TO BE PERFORMED ON FORCE ACCOUNT BASIS

Project Name Columbia River Bridge (Piers for superstructure) Date 17 October 1963

Highway Ore. Oregon Coast U.S. 101 Contract No. 6124

County CLATSOP Prefix 4-1803

Contractor DeLong Corporation F. A. Project No. F-003-1(18)

Address P. O. Box 330, Astoria, Oregon Order No. 2 - Supplemental

The following work is hereby classified as "Extra Work", to be performed and paid for in accordance with the terms of contract.

Description of work to be done:

Construct and place brush fascines in excess of that anticipated on original order. Furnish and place 4" minus rock and 1½" - 1" aggregate armor blanket. Fascines, rock and aggregate in erosion control on the river bottom around Pier 169.

1. Maximum equipment rental rates allowable as per A.G.C. agreement.
2. Percentage allowed contractor is in accordance with executed contract for the job.

Location by station numbers:

Pier 169 Station 292 + 75 to 294 + 00

Estimate of quantities and cost:

Original order: $20,000.00
Additional amount this order: $ 180,000
Total $200,000

Explanation: (Explain here the conditions which cause this work to be classed as "extra work")

Erosion resulting from scour action due to construction of pier not previously anticipated and no erosion work included in the contract. Erosion control work necessary to prevent undermining of footings and to allow installation of timber fender around pier - Erosion control work became more extensive than anticipated on original order.

INSTRUCTIONS: A single order should not cover more than one class of work or more than one extra work job.

Submit five copies of the order to Salem. After approval of the order by the assistant state highway engineer, the Salem office will send one copy to the contractor, one to the division engineer and one to the resident engineer.

Project authorization . . . . . $ 8,857,724

Present estimate of project cost, including $180,000.00 for work under this order $ 8,557,724

Expected under-run / over-run amount . . . . . $ —

Expected under-run / over-run per cent . . . . . —

Space to right of this line is for use of Salem Office

Submitted by: R. W. Ellison
Resident Engineer

Approval Recommended: R. D. Calvert
Division Engineer

Approval Recommended: Bruce Williamson
Construction Engineer
Bridge Engineer

Approved: P. M. Lee
Assistant State Highway Engineer
Office Engineer

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Form 2-59—15M—6 63

OREGON STATE HIGHWAY DEPARTMENT
Materials Division

Laboratory Report

Project: Columbia River Bridge
Highway: Oregon Coast
Contractor: DeLong Corp.
Submitted by: R. W. Ellison

Pr. No. 7949 Project No. 4-(13)38
County Clatsop
Contract No. 6184 F. A. Project No. U-4-003-1(14)
Date reported January 7, 1964

REPORT ON SAMPLE OF PORTLAND CEMENT CONCRETE

Class Seal Concrete for Mid Section Seal Footing Pier 103 Downstream
Represented by 3 cylinders, set number R-75 Date cast December 8, 1963
Sampled by D. Bartell Date received December 9, 1963

TEST RESULTS

Curve A—
Fine Agg.: Data Sheet No. Lab. No. Per cent Size
Data Sheet No. Lab. No. 664130 Per cent 100 Size Sand Fine. Factor

Curve B—
Coarse Agg.: Data Sheet No. Lab. No. 669870 Per cent Size 1"-1 Fine. Factor
Data Sheet No. Lab. No. 664133 Per cent Size 1-#4 Fine. Factor
Data Sheet No. Lab. No. Per cent Size Fine. Factor

Curve C—Combined Agg.: Fine Aggregate % Coarse Aggregate % Size Fine. Factor
Cement: Brand Permanente Type I Insp. Report No. Lab. No. 664925
Calculated strength in 28 days 3000 lbs./sq. in. using 7-9 in. slump. Real Mix—1: W/C Ratio
Nominal Mix: Volume—1: Weight—94: 177.5:372.5
Remarks: 6.93 Sk. mix. Poured at 8" slump. Entrained air 4.0%. Concrete dry batched into roto bags at Tongue Point and mixed on mixer barge 103 at pier site. Cylinders field cured 24 hrs. on mixing barge.

Lab. No.	Data Sheet No.	Cylinder	Compressive Strength	Date	Remarks on Break
		A	lbs. per sq. in. at	days	6,
A-0250	C22514	R-75B	5235 lbs. per sq. in. at 28	days January 5, 1964	
A-0251	"	" C	5375 lbs. per sq. in. at 28	days January 6, 1964	
		D	lbs. per sq. in. at	days	
		E	lbs. per sq. in. at	days	
		F	lbs. per sq. in. at	days	

RECOMMENDATIONS

TEST REPORT DISTRIBUTION:
Bureau of Public Roads
Construction Engineer
Maintenance Engineer
~~x~~ Bridge Engineer
Requisition Office
x Division Engineer2
x Resident Engineer Allison
Dist. Maint. Sup't
x Files
Materials Division (Salem)
State Printing $2502

R. W. Ellison
By

[signature] Engineer of Materials

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OREGON STATE HIGHWAY DEPARTMENT

TABULATION SHEET ..... SHEET ..... OF ..... SHEETS

Coto Bags — COLUMBIA RIVER BRIDGE

CONCRETE POUR RECORD

TYPE MIX: 6.93 SK. SEAL — POUR LOCATION: PIER 331 — Barge #172

STATE PRINTING — DATE: Dec 5, 1963

TIME	TRUCK	CU. YD.	3/8 – 1/4	SAND	1 1/2 – 1	1 — 4	CEMENT	AEA	WATER	REMARKS
AM 12:01		1½		4733	1626	2882	977		6.0%	SAND MOIST
	IIII IIII II	12:10 AM.		CARRIAGE Hoist cable pulled						
2:00		CUT ON DRUM								12
	IIII	cable, 12:51 A.M. START BAGGING.								
AM 1:00		1:10 AM. EMPTY Coto Bag. Hoist Control Cable Pulled								16
	IIII IIII	LUNCH 1:30 AM Cable SPLiced And crew START								
AM 1:00		PRODUCTION								26
	IIII IIII I	2:15 AM CARRIAGE Forward direction cable								
AM 5:00		STRAN-12d Crew REPLACING. 3:22 PM CREW START								37
	IIII IIII IIII	BAGGING AGAIN								
AM 5:00										56
	IIII IIII III									
AM 7:00										74
	IIII IIII III									
AM 9:00										92
		TOTAL 92 BAGS 6.93 MIX								
		8:00 A.M. 12-6-63 Harold Freeman								

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